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United States
Court of Appeals
for the Ninth Circuit

SOUTHWESTERN PUBLISHING CO., INC., a
corporation, A. E. CAHLAN, NEVADA
CITIZENS COMMITTEE, INCORPOR-
ATED, SOUTHERN NEVADA CHAPTER,
a corporation, Appellants,

vs.

CHARLES LEE HORSEY, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK

No. 14738

United States
Court of Appeals
for the Ninth Circuit

SOUTHWESTERN PUBLISHING CO., INC., a
corporation, A. E. CAHLAN, NEVADA
CITIZENS COMMITTEE, INCORPOR-
ATED, SOUTHERN NEVADA CHAPTER,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answers to Complaint:	
Nevada Citizens Com., et al.....	33
Southwestern Pub. Co., et al.....	42
Appeal:	
Bond on	92
Certificate of Clerk to Transcript of Record	
on	100
Notice of	97
Order Extending Time to File and Docket	
Record on	100
Statement of Points on (USCA).....	183
Undertaking on	98
Bill of Costs	89
Bond on Appeal	92
Certificate of Clerk to Transcript of Record...	100
Complaint	3
Copy of Civil Docket Entry of Sept. 29, 1954..	88
Instructions to the Jury	75

Minute Order, Dec. 29, 1954, Order Motion to Retax Costs Withdrawn, Motion for New Trial Denied	94
Motions for More Definite Statement, Notice of Nevada Citizens Com., et al.....	28
Southwestern Pub. Co., et al.....	23
Motion for New Trial, Defendants'.....	91
Motions to Amend Answer, Nevada Citizens Com., et al.:	
Filed Dec. 10, 1952	55
Filed Dec. 12, 1952	57
Motions to Separately State Causes of Action:	
Nevada Citizens Com., et al.....	26
Southwestern Pub. Co., et al.....	21
Motions to Strike, Notice of:	
Nevada Citizens Com., et al.....	30
Southwestern Pub. Co., et al.....	24
Motions to Strike from Answer, Notice of:	
To Nevada Citizens Com., et al.....	53
To Southwestern Pub. Co., et al.....	51
Names and Addresses of Attorneys.....	1
Notice of Appeal	97
Notice of Entry of Order Denying Defendants' Motion for New Trial	96
Objections to Request of Admissions, Nevada Citizens Com., et al.....	71
Order Denying Defendants' Motion for New Trial	95

Order Denying Defendants' Motion to Strike, Motion for More Definite Statement and Mo- tion to Separately State Causes of Action...	61
Order Extending Time to File and Docket Record	100
Order on Plaintiff's Motion to Strike from Answer	59
Request for Admissions addressed to:	
Nevada Citizens Com., et al.....	68
Southwestern Pub. Co., et al.....	66
Response to Request for Admissions, Nevada Citizens Com., et al.....	73
Statement of Points on Which Appellants Will Rely (USCA)	183
Stipulation on Plaintiff's Motion to Strike Por- tion of Complaint	62
Stipulation re Defendants' Motion to Amend Answer	64
Summons	20
Transcript of Proceedings and Testimony.....	103
Witnesses:	
Cahlan, A. E.	
—direct	176
—cross	177
Gardner, Paul K.	
—Deposition	144

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Horsey, Charles Lee, Jr.

—direct 136

—cross 141

Horsey, Charles Lee, Sr.

—direct 106

—cross 125

Undertaking on Appeal 98

Verdict 75

NAMES AND ADDRESSES OF ATTORNEYS

JONES, WIENER & JONES,
230 South Fifth Street,
Las Vegas, Nevada, and

MILTON W. KEEFER,
Cornet Building,
Las Vegas, Nevada, and

W. HOWARD GRAY,
Ely, Nevada, and

BRUCE R. THOMPSON,
15 East First Street,
Reno, Nevada,

For the Appellant.

RAILLI, RUDIAK & HORSEY,
425 Fremont Street,
Las Vegas, Nevada, and

CLYDE D. SOUTER,
211 Byington Building,
Reno, Nevada,

For the Appellee.

In the District Court of the United States in and
for the District of Nevada

Case No. 1025

CHARLES LEE HORSEY, Plaintiff,

vs.

SOUTHWESTERN PUBLISHING CO., INC., a
Nevada corporation; A. E. CAHLAN; JOHN
F. CAHLAN; NEVADA CITIZENS COM-
MITTEE INCORPORATED, SOUTHERN
NEVADA CHAPTER, a Nevada corporation;
A. W. BLACKMAN, VERN WILLIS, FRANK
M. BOLLIG, ABE MILLER and HARRY E.
CLAIBORNE, individually, and as Trustees of
NEVADA CITIZENS COMMITTEE INCOR-
PORATED, SOUTHERN NEVADA CHAP-
TER, a Nevada corporation; J. R. HENDER-
SON, DOES ONE to TWENTY, inclusive;
BLACK AND WHITE COMPANY, a co-
partnership; and RED AND GREEN, INC., a
corporation, Defendants.

COMPLAINT FOR DAMAGES

The Plaintiff complains of the Defendants, and
each of them, and for cause of action alleges:

I.

That the Plaintiff is a citizen of the State of
California and the Defendants, and each of them,
are citizens of the State of Nevada. The matter in
controversy exceeds, exclusive of interest and costs,
the sum of Three Thousand (\$3,000.00) Dollars.

II.

That at all times herein mentioned, Defendant, Southwestern Publishing Co., Inc., was, and is now, a corporation, organized and existing under and by virtue of the laws of the State of Nevada, and was, and is now, the owner, proprietor, and publisher of that certain daily newspaper known as the Las Vegas Review-Journal; that at all times herein mentioned, said newspaper was composed, printed, issued and published daily, except Saturdays, in the City of Las Vegas, County of Clark, State of Nevada, and was widely circulated throughout said County and in other Counties in the State of Nevada, and elsewhere, and, at the time of the defamatory publication hereinafter mentioned, as the Plaintiff is informed and believes and therefore alleges, said newspaper had a daily circulation of fourteen thousand copies, more or less.

III.

Plaintiff is informed and believes, and, upon such information and belief, alleges the fact to be, that at all times herein mentioned, Defendant, A. E. Cahlan, was, and is now, a member of the Board of Directors of Defendant, Southwestern Publishing Co., Inc., and was, and is now, the Managing Director of the said Las Vegas Review-Journal, and that, as such Managing Director, he had active charge and control of the management, conduct and policy of said newspaper, the power and authority to hire, fire, and discipline its employees and to direct their activities, and the power, duty and re-

sponsibility of editing all printed matter published in said newspaper and of ascertaining the truth and accuracy of such matter in advance of its publication, and of excluding from publication in said newspaper all untruthful and libelous matter.

IV.

Plaintiff is informed and believes, and upon such information and belief, alleges the fact to be, that at all times herein mentioned Defendant, John F. Cahlan, was, and is now, the Editor of the said Las Vegas Review-Journal, and that, as such Editor, at all times herein mentioned, he had the power, duty and responsibility of editing all printed matter published in said newspaper and of ascertaining the truth and accuracy of such matter in advance of its publication, and of excluding from publication in said newspaper untruthful and libelous matter.

V.

That at all times herein mentioned, Defendant, Nevada Citizens Committee Incorporated, Southern Nevada Chapter, was, and is now, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and at all times herein mentioned, has been variously known as and called, and is sometimes hereinafter referred to, as "The Citizens Committee", the "Nevada Citizens Committee", and "Nevada Citizens Committee, Las Vegas, Nevada".

VI.

That at all times herein mentioned, Defendants,

A. W. Blackman; Vern Willis, Frank M. Bollig, Abe Miller, and Harry E. Claiborne, were the Trustees of Defendant, Nevada Citizens Committee, and, as such, had the power, and it was their duty and responsibility to formulate the policies of said corporate Defendant, including the public statements and pronouncements of said corporate Defendant, and to supervise and direct the activities of all agents, servants and employees of said corporate Defendant, including the activities of Wilson Baden.

VII.

That at all times herein mentioned, Wilson Baden, was the Secretary-Manager of Defendant, Nevada Citizens Committee; that the Plaintiff is informed and believes, and upon such information and belief, alleges the fact to be, that, as such Secretary-Manager, Wilson Baden, at all times herein mentioned, served as the full-time paid executive officer, agent and employee of said corporate Defendant, and was its agent and representative and that he was authorized to, and it was his duty and responsibility to execute and carry into effect the general policies laid down by Defendants, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, as Trustees of said corporate Defendant, and Defendant, J. R. Henderson, as Chairman of said corporate Defendant, and that he was at all times herein mentioned acting within the scope of his authority and as the agent of the Defendants named in this Paragraph VII.

VIII.

That at all times herein mentioned, Defendant, J. R. Henderson, was the Chairman of Defendant, Nevada Citizens Committee; that the Plaintiff is informed and believes, and upon such information and belief, alleges the fact to be, that, as such Chairman, said Defendant was both a policy-making and executive officer of said corporate Defendant, and that he acted in concert with, and frequently influenced the policy-making decisions of the Trustees of said corporate Defendant, and that he was authorized, and it was his duty and liability as the agent and representative of said corporate Defendant, to execute and carry into effect the policies laid down by its Trustees.

IX.

That Defendants, Does One to Twenty, inclusive, Black and White Company, a co-partnership, and Red and Green, Inc., a corporation, are the fictitious names of defendants, whose true names and capacities, whether individual, partnership, or corporate, and whether principal or representative, are presently unknown to the Plaintiff, and when such true names and capacities are ascertained, the Plaintiff will ask leave of the Court to amend this Complaint by substituting such true names and capacities for such fictitious ones.

X.

That on and prior to the 5th day of November, 1950, the Plaintiff had resided in the State of Ne-

vada and had been duly licensed as an attorney at law in the State of Nevada for more than forty-six years, and had actively engaged in the practice of his profession for many years during said period, and through such practice had acquired and enjoyed a reputation throughout the State of Nevada, and, particularly, in Clark County, Nevada, as an honest, honorable, able and fair-minded attorney and counselor at law. That during his many years of residence in said State, the people of the State of Nevada had honored the Plaintiff with, and the Plaintiff had served the people of the State of Nevada, in numerous public offices of honor, confidence and trust, as follows: As District Attorney of Lincoln County, Nevada, from 1906 to 1909; As State Senator from Lincoln County, Nevada, from 1913 to 1914; As District Judge of the Tenth Judicial District Court in and for the Counties of Lincoln and Clark, from 1915 to 1919; As State Senator from Clark County, 1939 to 1940; As District Judge of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, June to October, 1945; As Justice of the Supreme Court of the State of Nevada, commencing October, 1945, and culminating with the office of Chief Justice of the Supreme Court of the State of Nevada, which office of Chief Justice, Plaintiff had been elected to fill, and did fill, and the duties of which office he did perform until January 1, 1951. That in all of said offices, the Plaintiff at all times conducted and demeaned himself with honesty, integrity, fidelity and impartiality,

and at all times enjoyed a good reputation for, and the confidence of the People of the State of Nevada in, his honesty, integrity, fidelity, impartiality, fair-mindedness and legal ability.

XI.

That on or about the 5th day of November, 1950, Defendants, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually, and acting in concert as the Trustees and representatives of Defendant, Nevada Citizens Committee, and within the scope of their authority as such, and Defendant, J. R. Henderson, individually, and acting as Chairman of the Nevada Citizens Committee, and within the scope of his authority as such, and Wilson Baden, individually, and as Secretary-Manager of said Defendant, Nevada Citizens Committee, and acting within the scope of his authority as such, and Defendant, Nevada Citizens Committee, wilfully, wickedly and maliciously, conspiring, confederating, and acting in concert together, with intent thereby to injure and defame the Plaintiff in his good name and reputation as an attorney at law, and as a Judge, and as a Justice of the Supreme Court of the State of Nevada, and with the intent thereby to discredit the Plaintiff and to bring him into disrepute with the people of the State of Nevada and to subject him to public hatred, ridicule, contempt and obloquy, submitted to the defendant, Southwestern Publishing Co., Inc., with the request, and with the intent and purpose that the same be printed and published

by said Defendant, Southwestern Publishing Co., Inc., as a paid advertisement in the said Las Vegas Review-Journal, and Defendants, Southwestern Publishing Co., Inc., A. E. Cahlan, its Managing Editor, and John F. Cahlan, its Editor, wilfully, wickedly and maliciously conspiring, confederating and acting together in concert with and among themselves and with and among the other named Defendants, with the intent thereby to injure and defame the Plaintiff in his good name and reputation as an attorney at law, and as a Judge, and as a Justice of the Supreme Court of the State of Nevada, and with the intent thereby to discredit the Plaintiff and to bring him into disrepute with the people of the State of Nevada and to subject him to public hatred, ridicule, contempt and obloquy, did cause to be inserted and published, and did publish, in the Sunday, November 5, 1950, issue of said Las Vegas Review-Journal, the following words, figures and language about, and with reference to, the Plaintiff, to-wit:

“a Timely message to All Nevada Voters who believe in government Of All the people, By All the people, For All the people . . .

Vote Only For An
Impartial Candidate For
Supreme Court Justice!!

No Man whose statements show a Bias in favor of any special interest or group has any business on the bench!

The Nevada Citizens Committee
Urges You To
Vote Against
Charles Lee Horsey
Candidate for Supreme Court Justice

The editorial reprinted herewith states the case against horsey. It is reprinted in full from a Northern Nevada newspaper, the Lovelock 'Review-Miner.'

Your Editor Plans To Vote Against Justice Horsey
on November 7th

An Editorial, by Paul K. Gardner

Your editor is going to vote against Supreme Court Justice Chas. Lee Horsey on November 7.

The reason is that he has a biased viewpoint on certain cases coming before him.

When the justice called at The Review-Miner office recently while conducting his campaign, the following conversation took place:

Editor: "What about the report that you are pro-labor?"

Justice Horsey: "I admit I am." Then he chuckled.

No justice has any business on the bench who has a bias. He is sworn to approach each case with an open mind. Each case must be considered on its merits. A judge with opinions, not subject to change, cannot do that.

By pro-labor is meant labor racketeers. The laboring man, in and out of the union, seeks only

a fair deal. The labor racketeers seek to gain ends whether fair or not.

Such a case recently came before Justice Horsey. It had to do with a law adopted in 1913. He joined with Justice Eather in declaring it unconstitutional. It took away the right of a business to prosperity without having recourse to the courts of justice by giving the right to labor racketeers to harass it.

Involved was the White Cross Drug Store of Las Vegas. There was no labor difficulty. The employees were well paid, satisfied and nonunion. The labor racketeers demanded that the store be unionized against the will of the workers and the owner. When refused, pickets were ordered in front of the store. An injunction was obtained, as we understand the matter. Justice Horsey ruled that the law under which the injunction was issued was no good. In effect, he gave the racketeers permission to put on pickets indefinitely to drive union patronage away. Such ruling enables the racketeers to force every business in the country into union contracts whether the owners or their employers were in favor of it or not. In other words, it deprives an owner from conducting a profitable business and working people of the right to work.

It makes no difference to us: Any man who is prejudiced in favor of business, labor, labor racketeers, farming or gambling, has no business on the Nevada supreme court bench.

This editorial appeared in the Lovelock Review-Miner, Oct. 26, 1950.

Urge your friends Not to vote for horsey for Supreme Court Justice! Please re-read the last sentence of the above editorial: 'Any man who is prejudiced in favor of business, labor, labor racketeers, farming or gambling' (or, we add, any other specialized interest) 'has no business on the Nevada Supreme Court bench.'

()

A Reminder: Work for the Right
to work . . . Sign the Initiative Petition!

"Nevada

Citizens

Committee

True Representative of and by the People
(Insignia of a Hand holding a Torch)

Nevada Citizens Committee

Box 741

Las Vegas, Nevada

Nevada voters fortunately are blessed in that they have excellent choice among the many good opposing candidates running for public office. The Nevada Citizens Committee is unalterably *opposed* to any candidate whose record or back ground indicates bias against the general public interest."

Paid Political Adv.

XII.

That at the time of the publication of said false, defamatory, and libelous advertisement in the Las Vegas Review-Journal as aforesaid, and for many years prior thereto, as the Defendants, and each of them, then well knew, it had been the custom

and usage in the printing and publishing business in Clark County, Nevada, and generally throughout the State of Nevada and throughout the United States, in referring to a person disliked or held in contempt by the publisher, to print the name of such person in lower case letters without capitalizing the first letter of each given name and surname, in order to communicate to the public the publisher's dislike, discourtesy, contempt, and disrespect for such person.

XIII.

Plaintiff is informed and believes and therefore alleges the fact to be that Defendants, Nevada Citizens Committee, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually, and as Trustees of Defendant, Nevada Citizens Committee, and Defendant, J. R. Henderson, individually, and as Chairman of said corporate Defendant, wilfully, wickedly, and maliciously conspiring, confederating, and acting together in concert to defame the Plaintiff, acting by and through the said Wilson Baden, their duly authorized agent, and knowing full well of said custom and usage, caused the aforesaid libelous advertisement to be submitted to Defendants, A. E. Cahlan, John F. Cahlan, and Southwestern Publishing Co., Inc., a Nevada corporation, for publication in the Las Vegas Review-Journal, with instructions that the Plaintiff's name as printed in said advertisement was to be, and it was in fact, printed entirely in lower case letters. That said Defendants

thereby intended to evidence and represent to the public and did, in fact, evidence and represent to the public the malice, hatred, scorn, contempt, and disrespect of said Defendants, and each of them, towards the Plaintiff. That Defendants A. E. Cahlan, John F. Cahlan, and Southwestern Publishing Co., Inc., a Nevada corporation, wilfully, wickedly, and maliciously conspiring, confederating, and acting together in concert with each other and with the other Defendants named in this Paragraph XIII and with the said Wilson Baden, as agent of the aforesaid other Defendants, in order to defame the Plaintiff and knowing all the while full well of the existence of the aforesaid custom and usage, caused to be published, and published, the aforesaid libelous advertisement in the Sunday, November 5, 1950, issue of the Las Vegas Review-Journal in the aforesaid form whereby the Plaintiff's name was printed entirely in lower case letters. That said Defendants thereby intended to evidence, and represent to the public, and did, in fact, evidence and represent to the public, the malice, hatred, scorn, contempt, and disrespect of said Defendants, and each of them, towards the Plaintiff.

XIV.

That the aforesaid libelous advertisement, by reason of its contents and of the printing of the Plaintiff's name therein entirely in lower case letters, as aforesaid, was generally understood and taken by many persons in Clark County, Nevada, and elsewhere in the State of Nevada, including

many voters and many persons not associated with the printing and publishing business, to mean that in the opinion of said defendants, the sponsors and publishers of said advertisement, the Plaintiff was unworthy of common courtesy and respect but was to be held by the public in scorn, contempt and opprobrium.

XV.

That said publication was, in fact, false and defamatory in this, among other things, that the remark attributed to the Plaintiff in the editorial purportedly reprinted from the Lovelock Review-Miner, was subtly and designedly taken out of context and distorted in said editorial to give an entirely false impression of the Plaintiff's full statement and meaning in that the Plaintiff, in fact, informed the said Paul K. Gardner upon the occasion mentioned in said editorial that, although the Plaintiff had a personal sympathy for the workingman and, as a legislator, had had a long record of devotion to legislation commonly known as "labor legislation", as a Judge, he had never permitted any personal sympathy for the working man to influence his decisions, but that, on the contrary, he had always decided each case strictly according to the facts and to the applicable legal precedents. That said publication was, in fact, also false and defamatory in this, among other things, that contrary to the import, meaning and intendment of said publication, the Plaintiff had never, either upon said purported occasion or at any other time, admitted to a prejudice, nor was he, in fact, prejudiced, as

therein alleged, in favor of labor racketeers or any other special interest group. That, on the contrary, in all his years upon the Bench, as District Judge, Justice, and Chief Justice of the Supreme Court, in all cases coming before him, including the case involving the White Cross Drug Store mentioned in said publication, the Plaintiff made an honest and earnest endeavor to, and to the best of his knowledge and belief, did render his decisions without any bias, prejudice, or partiality for or against any person or group, but strictly in conformity with the facts of each case, the requirements of legal precedent, and the dictates of good conscience.

XVI.

That on the 5th day of November, 1950, the Plaintiff was a candidate for public office to succeed himself for an additional term of six years as a Justice of the Supreme Court of the State of Nevada. That by means of said false and defamatory publication the Defendants caused the Plaintiff to be defeated as a candidate for said office and to lose the emoluments of said office; that if, on the contrary, the Plaintiff had been elected, it was his fixed and firm intention to have continued to serve for the period of approximately five years and seven months of such six year term, at which time he would have become eligible for retirement, because of his having then served as a Judge and Justice, under the provisions of Section 4881.01, Nevada Compiled Laws, as amended, for the period of at least fifteen (15) years; that his salary of \$8,000.00 per year for such

five years and seven months would have amounted to \$44,666.66, and in which said sum of \$44,666.66 the Plaintiff has been damaged. That the Plaintiff would, at, on or about such time, have availed himself of his right and privilege to retire and would, upon the completion of such five years and seven months, and on or about August first, 1956, have resigned as such Justice, but before doing so would have taken proper steps before the appropriate officials to have been placed upon retirement status, and would have thereby, commencing on such August first, 1956, have had the right to receive, and would have at such time, commenced to receive the pension rights and privileges of said Section 4881.01, Nevada Compiled Laws, as amended, and that the Plaintiff by reason of the wrongful and malicious and wicked actions of the Defendants, in the premises, as hereinabove alleged, and based upon the Plaintiff's expectancy of life, will suffer, inevitably, further damages in the amount of \$18,284.39. That prior to ascending to the bench as a Justice of the Supreme Court of the State of Nevada, the Plaintiff had enjoyed a successful practice in his profession as an attorney at law and had earned in his profession as much as \$18,000.00 per year. That by means of said false and defamatory publication, the Defendants injured the Plaintiff in his reputation and good name as a lawyer, "as a jurist,"* and as a man of honor and integrity, and caused him such great humiliation and mental anguish and suffering that he became and remains crushed in body and spirit, and

his health was and is thereby and therefrom impaired, and he was and is disabled and incapacitated from pursuing his profession as an attorney at law, to his further damage in the sum of \$115,920.00. That in addition to having become disabled and incapacitated from pursuing his profession as an attorney at law by reason of great humiliation and mental anguish and suffering, as hereinabove alleged, Plaintiff has been further damaged by reason of such great humiliation and mental anguish and suffering in the sum of \$50,000.00. That by reason of the premises, the Plaintiff has been damaged in the sum of \$228,871.05 general damages.

* Stricken order of 12/11/52.

XVII.

That the Defendants, and each of them, and all of them, caused said defamatory language to be published, and did publish said defamatory language of and with reference to the Plaintiff, maliciously, wickedly, and vindictively and with hatred, evil design, and ill-will towards the Plaintiff, knowing or having reason to know all the while that the same was false and untrue, or, wantonly disregarding the rights of the Plaintiff and without making any effort to ascertain whether the same were true or false; and that by reason of such wilful, wanton, and malicious attack upon his character, reputation and good name as a lawyer, as a jurist, and as a man of honor and integrity, the Plaintiff has been damaged in the further sum of \$100,000.00 exemplary and punitive damages.

Wherefore, Plaintiff prays judgment against the Defendants, and each of them, in the sum of \$228,-871.05 general damages; in the further sum of \$100,000.00 punitive and exemplary damages, for his costs of suit herein, and for such other and further and appropriate relief as may be just and meet in the premises.

RALLI, RUDIAK & HORSEY,

/s/ By PAUL RALLI,

/s/ By GEORGE RUDIAK,

/s/ By D. FRANCIS HORSEY,

Attorneys for Plaintiff

/s/ CLYDE D. SOUTER, of Counsel

[Endorsed]: Filed July 22, 1952.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Ralli, Rudiak & Horsey, plaintiff's attorneys, whose address is 200-203 Professional Bldg., 425 Fremont Street, Las Vegas, Nevada, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: July 22, 1952.

[Seal] /s/ AMOS P. DICKEY,
 Clerk of Court
 /s/ By O. F. PRATT,
 Deputy Clerk

Return of Service of Writs attached.

[Endorsed]: Filed August 5, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SEPARATELY
STATE CAUSES OF ACTION

To: Ralli, Rudiak & Horsey, Esquires, and Clyde
D. Souter, Esquire, all attorneys for Plaintiff,
the address of Messrs. Ralli, Rudiak & Horsey
being 200-203 Professional Building, 425 Fre-
mont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, South-
western Publishing Co. Inc., a Nevada corporation,
A. E. Cahlan and John F. Cahlan, will severally
each for itself and himself, move the above entitled
court, at the court room thereof in the United
States Court and Post Office Building, City of Las
Vegas, County of Clark, State of Nevada, on the
29th day of September, 1952, at 10:00 o'clock in
the forenoon of that day, or as soon thereafter as
counsel can be heard for an order directing Plain-
tiff to serve an amended Complaint herein stating
in separate counts the claim asserted by Plaintiff

for alleged damage suffered as Attorney at Law arising out of the alleged statement in Plaintiff's Complaint and the claim asserted by Plaintiff for alleged damages suffered as Judge and public official arising out of the alleged claim set forth in Plaintiff's Complaint.

The motion is made upon the ground that said claims must necessarily be set forth in separate statements so that a clear presentation of the matter can be set forth in accordance with the Federal Rules of Civil Procedure.

In making the foregoing motion Defendants Southwestern Publishing Co. Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan, each for itself or himself, will rely upon the pleadings and files in the above entitled case.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A MORE
DEFINITE STATEMENT

To: Ralli, Rudiak & Horsey, Esquires, and Clyde D. Souter, Esquire, all attorneys for Plaintiff, the address of Messrs. Ralli, Rudiak & Horsey being 200-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, Southwestern Publishing Company, Inc., a Nevada Corporation, A. E. Cahlan and John F. Cahlan, will, severally each for itself and himself, move the above entitled court, at the court room thereof in the United States Court and Post Office Building, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of September, 1952, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard for an order directing Plaintiff to make a more definite statement of the purported causes of action set forth in Plaintiff's Complaint in this:

1. That Plaintiff be required to definitely plead as to whether or not he is seeking damages because of alleged *liable* allegedly published against him as a lawyer and/or allegedly published against him as a judge of the Supreme Court of the State of Nevada and a public officer.

In making the foregoing motion Defendants Southwestern Publishing Co. Inc., a Nevada Corporation, A. E. Cahlan and John F. Cahlan, each

for himself or itself, will rely upon the pleadings and files in the above entitled case.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Southwestern Publishing Co., Inc., a Nevada Corporation, A. E. Cahlan and John F. Cahlan.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE

To: Ralli, Rudiak & Horsey, Esquires, and Clyde D. Souter, Esquire, all attorneys for Plaintiff, the address of Messrs, Ralli, Rudiak & Horsey being 200-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan, will, severally each for itself and himself, move the above entitled court, at the court room thereof in the United States Court and Post Office Building, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of September, 1952, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order striking from

Plaintiff's Complaint the following allegations on the ground that they are immaterial.

1. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that by", line 13, page 12, of Plaintiff's Complaint, down to and including the words "of Nevada", line 13, page 12 of Plaintiff's Complaint;

2. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that by," line 13, page 12, of Plaintiff's Complaint, down to and including the words "said office", line 15, page 12 of Plaintiff's Complaint;

3. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the word "that", line 15, page 12, of Plaintiff's Complaint, down to and including the words "been damaged", line 25, page 12, of Plaintiff's Complaint;

4. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that the Plaintiff", line 25, page 12, of Plaintiff's Complaint, down to and including the words and figures "of \$18,284.39", line 7, page 13, of Plaintiff's Complaint.

That said allegations are immaterial in that damages cannot be predicated upon failure of election to office as damages in such connection are necessarily too *remove* and speculative to justify consideration.

In making the foregoing motion Defendants

Southwestern Publishing Co. Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan, each for itself or himself, will rely upon the pleadings and files in the above entitled case.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Southwestern Publishing Co. Inc., a Nevada corporation; A. E. Cahlan and John F. Cahlan.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SEPARATELY
STATE CAUSES OF ACTION

To: Ralli, Rudiak & Horsey, Esquires, and Clyde D. Souter, Esquire, all attorneys for Plaintiff, the address of Messrs. Ralli, Rudiak & Horsey being 200-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, South-

ern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, will, severally each for itself and himself, move the above entitled court, at the court room thereof in the United States Court and Post Office Building, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of September, 1952, at 10:00 a.m. o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directing Plaintiff to serve an amended Complaint herein stating in separate counts the claim asserted by Plaintiff for alleged damage suffered as Attorney at Law arising out of the alleged statement in Plaintiff's Complaint and the claim asserted by Plaintiff for alleged damages suffered as Judge and public official arising out of the alleged claim set forth in Plaintiff's Complaint.

The motion is made upon the ground that said claims must necessarily be set forth in separate statements so that a clear presentation of the matter can be set forth in accordance with the Federal Rules of Civil Procedure.

In making the foregoing motion Defendants Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, each for himself or itself, will rely upon the pleadings and files in the above entitled case.

Gray and Horton, Ely National Bank
Building, Ely, Nevada, and Milton
W. Keefer, Suite 1, Cornet Build-
ing, Las Vegas, Nevada

/s/ By MILTON W. KEEFER,

Attorneys for Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A MORE DEFINITE STATEMENT

To: Ralli, Rudiak & Horsey, Esquires, and Clyde D. Souther, Esquire, all attorneys for Plaintiff, the address of Messrs. Ralli, Rudiak & Horsey being 200-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, Nevada Citizens Committee Incorporated, Southern Nevada

Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, will, severally each for itself and himself, move the above entitled court, at the court room thereof in the United States Court and Post Office Building, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of September, 1952, at 10:00 a.m. o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directing Plaintiff to make a more definite statement of the purported causes of action set forth in Plaintiff's Complaint in this:

1. That Plaintiff be required to definitely plead as to whether or not he is seeking damages because of alleged *liable* allegedly published against him as a lawyer and/or allegedly published against him as a judge of the Supreme Court of the State of Nevada and a public officer.

In making the foregoing motion Defendants Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, each for himself or

itself, will rely upon the pleadings and files in the above entitled case.

GRAY AND HORTON and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE

To: Ralli, Rudiak & Horsey, Esquires, and Clyde D. Souter, Esquire, all attorneys for Plaintiff, the address of Messrs. Ralli, Rudiak & Horsey being 200-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada. Sirs:

Please take notice that the undersigned, Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees

of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, will, severally each for itself and himself, move the above entitled court, at the court room thereof in the United States Court and Post Office Building, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of September, 1952, at 10:00 a.m. o'clock, in the forenoon of that day, or as soon thereafter as counsel can be heard for an order striking from Plaintiff's Complaint the following allegations on the ground that they are immaterial:

1. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that on", line 10, page 12, of Plaintiff's Complaint, down to and including the words "of Nevada", line 13, page 12, of Plaintiff's Complaint;

2. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that by", line 13, page 12, of Plaintiff's Complaint, down to and including the words "said office", line 15, page 12, of Plaintiff's Complaint;

3. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the word "that", line 15, page 12, of Plaintiff's Complaint, down to and including the words "been damaged", line 25, page 12, of Plaintiff's Complaint;

4. Those certain allegations contained in Paragraph 16 of Plaintiff's Complaint beginning with the words "that the Plaintiff", line 25, page 12, of Plaintiff's Complaint, down to and including the

words and figures "of \$18,284.39", line 7, page 13, of Plaintiff's Complaint.

That said allegations are immaterial in that damages cannot be predicated upon failure of election to office as damages in such connection are necessarily too remote and speculative to justify consideration.

In making the foregoing motion Defendants Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, each for himself or itself, will rely upon the pleadings and files in the above entitled case.

GRAY AND HORTON and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now the above named Defendants, Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually, and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson; jointly and severally; and answering Plaintiff's Complaint, individually and jointly, admit, deny and allege as follows:

I.

Answering Paragraph I of Plaintiff's Complaint, these Defendants admit all of the matters therein alleged except that portion thereof which states "that the Plaintiff is a citizen of the State of California" and as to said portion thereof, allege that Defendants are without sufficient knowledge or information to form a belief as to the truth of said allegation and upon that ground deny the same.

II.

Answering Paragraphs II, III and IV of Plaintiff's Complaint, Defendants allege that they are without sufficient knowledge or information to form a belief as to the truth of said allegations, and upon that ground deny the same.

III.

Answering Paragraph V of Plaintiff's Complaint, Defendants admit all the allegations therein contained. [and in conjunction therewith and as a further answer to said allegations, allege that the said corporation Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, is and was a non-profit corporation, and was so organized under the laws of the State of Nevada.] [Marginal Note: Stricken by order of 12/11/52.]

IV.

Answering Paragraph VI of Plaintiff's Complaint, Defendants admit all of the matters therein alleged saving and except that Defendants deny the allegations beginning with the words "and, as such", line 21, page 3, down to and including the words "Wilson Baden", line 26, page 3, and the whole thereof.

V.

Answering Paragraph VII of Plaintiff's Complaint, Defendants admit all of the matters therein alleged save and except that portion commencing with the words "and that" on line 8 of page 4 of said Complaint and continuing through line 10, concluding with the words "Paragraph VII" on page 4 of said Complaint, and as to that portion of said paragraph, the Defendants deny the same.

VI.

Answering Paragraph VIII of Plaintiff's Complaint, Defendants admit all of the matters therein

alleged except that portion thereof which reads “both a policy making and” and “and frequently influenced the policy making decisions of”, which said portion of said Complaint, Defendants deny.

VII.

Answering Paragraph IX of Plaintiff's Complaint, Defendants allege they are without sufficient knowledge or information to form a belief as to the truth of the allegations therein contained, and upon such ground deny the same.

VIII.

Answering Paragraph X of Plaintiff's Complaint, Defendants allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained on page 5 of said Complaint beginning with the words “that on” on line 2 thereof, and continuing through the words “counsellor at law” on line 10 thereof; that Defendants admit the matters alleged in that portion of Paragraph X of Plaintiff's Complaint commencing with the words “That during” on line 10 thereof and concluding with the word “Nevada” on line 24 thereof; that Defendants deny that portion of Plaintiff's Complaint commencing on line 24 with the words “which office” on page 5 thereof and concluding with the words “until January 1, 1951” on line 26 thereof; and that the Defendants allege that they are without sufficient knowledge and information to form a belief as to the truth of the allegations contained in the remainder of said paragraph

commencing on line 26 thereof with the words "That in all" and concluding on line 31 thereof with the words "legal ability." and upon that ground deny the same.

IX.

Answering Paragraph XI of Plaintiff's Complaint, Defendants deny all of the matters alleged in said Paragraph save and except that portion thereof commencing on line 20 of page 6 of said Complaint with the words "submitted to the Defendant" and concluding on line 24 thereof with the words "Las Vegas Review Journal", and that portion of said paragraph commencing on line 2 of page 7 thereof with the words "did cause" and concluding on line 12 of page 9 of said Complaint with the words "paid political adv." and as to said portions of said paragraph, Defendants admit the matters therein alleged.

X.

Answering Paragraph XII of Plaintiff's Complaint, Defendants deny each and every allegation contained therein.

XI.

Answering Paragraph XIII of Plaintiff's Complaint, Defendants deny all of the allegations contained in said Paragraph save and except that the said Defendants admit that the publication referred to in Paragraph XI of Plaintiff's Complaint was published in the Sunday Edition of the Las Vegas Review Journal for November 5, 1950, and that Plaintiff's name was therein printed entirely in

lower case letters, and in this respect said Defendants deny the innuendo alleged relative to printing of Plaintiff's name in lower case letters.

XII.

Answering Paragraph XIV of Plaintiff's Complaint, Defendants deny all of the matters alleged therein.

XIII.

Answering Paragraph XV of Plaintiff's Complaint, Defendants deny all of the matters in said paragraph alleged down to and including line 31 of page 11 of said Complaint concluding with the words "special interest group"; and that with respect to the remainder of said paragraph, the Defendants are without sufficient knowledge or information to form a belief as to the truth of said allegations and thereupon deny the same.

XIV.

Answering Paragraph XVI of Plaintiff's Complaint, Defendants admit the matters alleged beginning on line 10 of page 12 thereof beginning with the words "That on" and concluding on line 13 thereof with the words "of Nevada"; that Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in that portion of said paragraph beginning with the words "That by means" on line 13 of page 12 thereof and concluding with the words "least 15 years" on line 22 thereof, and thereupon deny the same; that Defendants admit

that Plaintiff's salary of \$8,000.00 per year for five (5) years and seven (7) months would amount to \$44,666.66; but that Defendants specifically deny that Plaintiff has been damaged in the said sum of \$44,666.66 or any sum whatsoever; that Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph beginning with the words "That the Plaintiff" on line 25 of page 12 thereof and concluding with the words "laws as amended" on line 3 of page 13 thereof and upon that ground deny the same; that Defendants specifically deny the matter alleged in said paragraph commencing with the words "and that the Plaintiff" on line 3 of page 13 of said Complaint and concluding with the words "the amount of \$18,284.39" on line 7 page 13 thereof; and that Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph beginning with the words "That prior to" commencing on line 7 page 13 of said Complaint and concluding with the words and figures "\$228,871.05 general damages." on line 26 thereof, and thereupon deny the same; and Defendants specifically deny that Plaintiff has been damaged in the sum of \$115,920.00, the sum of \$50,000.00, and/or the sum of \$228,871.05 or any sum whatsoever.

XV.

Answering Paragraph XVII of Plaintiff's Complaint, Defendants deny all of the matters therein alleged.

As a Further and Separate Defense to Plaintiff's Complaint, Defendants allege as follows:

I.

That the Defendants have been informed and believe, and upon such information and belief allege that the statements purporting to be the statements of Plaintiff as made to the Editor of the Lovelock-Review Miner and contained in said publication published on November 5, 1950 in the Las Vegas Review Journal were statements made by the said Plaintiff, are and were true.

As a Further and Separate Defense, said Defendants allege as follows:

I.

That the editorial quoted from the Lovelock-Review Miner, a newspaper published in the Town of Lovelock, County of Pershing, and constituting part of the advertisement referred to in Plaintiff's Complaint as being published on November 5, 1950 in the Las Vegas Review Journal, was so published by the said Lovelock-Review Miner on the said 26th day of October, 1950; that the said editorial was acquired by and received by the said Defendants through generally recognized reliable sources of daily news, and was published by the Defendants for the information of the public and without any malice toward Plaintiff.

As a Further and Separate Defense to Plaintiff's Complaint, on file herein, Defendants allege as follows:

I.

That the said Plaintiff was a candidate for election to the office of Justice of the Supreme Court of the State of Nevada in the elections culminating on the 7th day of November, 1950; that the above named Defendants were associated together for the purpose of disseminating news and information to the general public relative to the qualifications of candidates for office; that in the capacity of disseminating news and information to the general public concerning the qualifications of candidates for public office the said Defendants obtained, through the usual course, a copy of the editorial published in the Lovelock-Review Miner on October 26, 1950, and that said Defendants believing the same to be true, so far as the facts therein stated and without malice toward the Plaintiff, caused the said editorial to be printed in the advertisement of November 5, 1950 in the Las Vegas Review Journal; said Defendants published the said advertisement upon the belief and under the conception that they were performing a public service in advocating the election to public office of men without bias or prejudice, and particularly men to the judiciary who were free from bias or prejudice toward any particular group; that the belief, intent and purpose of the said above named Defendants, and each of them, were set forth in the concluding paragraph of said advertisement, which reads as follows:

“Nevada voters fortunately are blessed in that they have excellent choice among the many good opposing candidates running for public office.

The Nevada Citizens Committee is unalterably opposed to any candidate whose record or background indicates bias against the general public interest.”

In so far as the words contained in said advertisement complained of by Plaintiff, consists of expressions of opinion, they are fair and impartial comments made in good faith and without malice upon the facts which are a matter of public interest, and were published in a public journal for the public benefit and are therefore privileged.

Wherefore, the above named Defendants respectfully pray that said Plaintiff's Complaint be dismissed, and that they go hence with costs.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, individually, and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed November 3, 1952.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Come Now the defendants Southwestern Publishing Co. Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan, and answering the Complaint on file herein, for themselves and themselves alone, admit, deny and allege as follows:

I.

Answering Paragraph I of said Complaint, defendants allege the fact to be that they are without knowledge or information sufficient to form a belief as to the truth of the averments therein contained commencing with the word "that", Line 281½, Page 1 and ending with the word "California", Line 281½, and upon that ground deny said allegations; defendants admit each and all the remaining allegations contained in said Paragraph I.

II.

Answering Paragraph II of said Complaint, defendants deny the words "the defamatory publication hereinafter mentioned", commencing on Line 11, Paragraph II, Page 2, and ending on Line 12, Paragraph II, Page 2; defendants admit each and all the remaining allegations contained in said Paragraph II.

III.

Answering Paragraph III of said Complaint, defendants admit each and all the allegations therein contained.

IV.

Answering Paragraph IV of said Complaint, defendants deny each and all the allegations therein contained commencing with the words "and that", Line 2, Page 3, Paragraph IV and ending with the words "libelous matter", Line 7, Paragraph IV, Page 3.

V.

Answering Paragraph V of said Complaint, defendants admit each and all the allegations contained therein.

VI.

Answering Paragraph VI of said Complaint, defendants allege they are without information or knowledge sufficient to form a belief as to the truth of the allegations therein contained, and upon that ground deny each and all the same.

VII.

Answering Paragraph VII of said Complaint, defendants allege they are without information or knowledge sufficient to form a belief as to the truth of the allegations therein contained, and upon that ground deny each and all the same.

VIII.

Answering Paragraph VIII of said Complaint, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and upon that ground deny each and all the same.

IX.

Answering Paragraph IX of said Complaint, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and upon that ground deny each and all the same.

X.

Answering Paragraph X of said Complaint, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained commencing with the words "That on", Line 2, Page 5, and ending with the words "at law", Line 10, Page 5, and upon that ground deny each and all the same; for further answer to said Paragraph X, defendants deny each and all the allegations therein contained commencing with the words "which office", Line 24, Page 5, and ending with the words "January 1, 1951", Line 26, Paragraph X, Page 5; for further answer to said Paragraph X, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained commencing with the words "that in," Line 26, Paragraph X, Page 5, and ending with the words "legal ability", Line 31½, Page 5, and upon that ground deny each and all of the same.

XI.

Answering Paragraph XI of said Complaint, defendants deny each and all the allegations therein contained commencing with the words "That on",

Line 2, and ending with the word "obloquy", Line 20, Paragraph XI, Page 6; for further answer to said Paragraph XI, defendants deny the allegations therein contained commencing with the word "wilfully, Line 26½, Page 6, and ending with the word "obloquy", Line 2, Paragraph XI, Page 7.

XII.

Answering Paragraph XII of said Complaint, defendants deny each and all the allegations therein contained.

XIII.

Answering Paragraph XIII of said Complaint, defendants deny each and all the allegations therein contained commencing with the letters "A. W.", Line 29, Paragraph XIII, Page 9, and ending with the word "plaintiff", Line 3, Paragraph XIII, Page 10; further answering said Paragraph XIII, defendants deny the allegations therein contained commencing with the word "and", Line 4, Paragraph XIII, Page 10, and ending with the word "libelous", Page 10, Paragraph XIII, Line 5; defendants further deny that portion of Paragraph XIII commencing with the words "that said", Line 11, Page 10, and ending with the word "plaintiff", Line 15; defendants further deny that portion of said Paragraph XIII commencing with the word "wilfully" Line 16, Paragraph XIII, Page 10, and ending with the word "usage", Line 22½, Paragraph XIII, Page 10, and deny the word "libelous," Line 23½, Paragraph XIII, Page 10; defendants further deny that portion of said Paragraph

XIII commencing with the words "that said", Line 261½, Paragraph XIII, Page 10, and ending with the word "plaintiff", Line 301½, Paragraph XIII, Page 10; defendants specifically deny the words "acting by and through the said Wilson Baden, their authorized agent", Lines 3 and 4, Paragraph XIII, Page 10, and "caused the", Line 5, Paragraph XIII, Page 10.

XIV.

Answering Paragraph XIV of said Complaint, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and upon that ground deny each and all the same.

XV.

Answering Paragraph XV of said Complaint, defendants deny each and all the allegations therein contained.

XVI.

Answering Paragraph XVI of said Complaint, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained commencing with the words "that by", Line 13, and ending with the word "years", Line 221½, Page 12, and upon that ground deny said allegations; for further answer to said Paragraph XVI, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions therein contained commencing with the words "that the", Line 25½, Page 12, and ending with the words "as amended", Line 3, Paragraph XVI, Page 13 and upon that ground deny each and all of said allegations; defendants upon said ground deny that portion of Paragraph XVI commencing with the words "that prior", Line 7, Paragraph XVI, Page 13, and ending with the words "general damages", Line 26, Paragraph XVI, Page 13; for further answer to said Paragraph XVI, defendants deny each and all the allegations therein contained commencing with the words "and in", Line 24½, Page 12, and ending with the word "damaged", Line 25½, Page 12; defendants further deny that portion of said Paragraph XVI commencing with the words "and that", Line 13, Paragraph XVI, Page 13, and ending with the figures \$18,-284.39", Line 7, Page 13; for further answer to said Paragraph XVI, defendants deny that plaintiff has been damaged in the sum of \$44,666.66 or any sum whatsoever for future wages as set forth in said Paragraph XVI and further deny that the plaintiff has been damaged in the sum of \$18,-284.39 or any sum whatsoever as set forth in Paragraph XVI, and further deny that plaintiff has been damaged in the sum of \$115,920.00 or any sum whatsoever; defendants further deny that the plaintiff has been damaged in the sum of \$50,000.00 or any sum whatsoever as set forth in Paragraph XVI of said Complaint and further deny that plaintiff has been damaged in the sum of \$228,871.05 or any sum whatsoever as set forth in said Paragraph

XVI; defendants specifically deny that plaintiff has been damaged in any of the amounts set forth in said Paragraph XVI or in any amount whatsoever as set forth in Paragraph XVI.

XVII.

Answering Paragraph XVII of said Complaint, defendants deny each and all the allegations contained in said Paragraph XVII and for further answer to said Paragraph XVII of said Complaint, defendants deny that plaintiff has been damaged in the sum of \$100,000.00 or any sum whatsoever as exemplary and/or punitive damages.

As a Further and Separate Defense to Said Plaintiff's Complaint, Defendants Allege As Follows:

I.

That the Defendants have been informed and believe, and upon such information and belief allege that the statements purporting to be the statements of plaintiff as made to the Editor of the Lovelock-Review Miner and contained in said publication published on November 5, 1950, in the Las Vegas Review Journal were statements made by the plaintiff, are and were true.

As a Further and Separate Defense, Defendants Allege As Follows:

I.

That the editorial quoted from the Lovelock-Review Miner, a newspaper published in the Town of

Lovelock, County of Pershing, and constituting part of the advertisement referred to in plaintiff's Complaint as being published on November 5, 1950 in the Las Vegas Review Journal, was so published by the said Lovelock-Review Miner, on the said 26th day of October, 1950; that the said editorial was acquired by and received by the said defendants through generally recognized reliable sources of daily news, and was published by the defendants for the information of the public and without any malice toward plaintiff.

As a Further and Separate Defense to Plaintiff's Complaint on File Herein, Defendants Allege as Follows:

I.

That the said plaintiff was a candidate for election to the office of Justice of the Supreme Court of the State of Nevada in the elections culminating on the 7th day of November, 1950; that the above named defendants were associated together for the purpose of disseminating news and information to the general public relative to the qualifications of candidates for office; that in the capacity of disseminating news and information to the general public concerning the qualifications of candidates for public office the said defendants obtained, through the usual course, a copy of the editorial published in the Lovelock-Review Miner on October 26, 1950, and that said defendants believ-

ing the same to be true, so far as the fact therein stated and without malice toward the plaintiff, caused the said editorial to be printed in the advertisement of November 5, 1950, in the Las Vegas Review Journal; said defendants published the said advertisement upon the belief and under the conception that they were performing a public service in advocating the election to public office of men without bias or prejudice, and particularly men to the judiciary who were free from bias or prejudice toward any particular group; that the belief, intent and purpose of the said above named defendants and each of them, were set forth in the concluding paragraph of said advertisement, which reads as follows:

“Nevada voters fortunately are blessed in that they have excellent choice among the many good opposing candidates running for public office. The Nevada Citizens Committee is unalterably opposed to any candidate whose record or background indicates bias against the general public interest.”

Insofar as the words contained in said advertisement complains of by plaintiff, consists of expressions of opinion, they are fair and impartial comments made in good faith and without malice upon the facts which are a matter of public interest, and were published in a public journal for the public benefit and are therefore privileged.

Wherefore, the above named defendants respect-

fully pray that said plaintiff's complaint be dismissed, and that they go hence with costs.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Defendants Southwestern Publishing Co., Inc., a Nevada Corporation; A. E. Cahlan and John F. Cahlan.

Acknowledgment of Service attached.

[Endorsed]: Filed November 3, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE FROM
ANSWER

To: Southwestern Publishing Co., Inc., a Nevada corporation; A. E. Cahlan and John F. Cahlan, defendants above named, and

To: Jones, Wiener & Jones, Esquires, their attorneys.

You and Each of You Will please Take Notice that on Friday, the 12th day of December, 1952, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the court room of the above entitled court, at the United States Court and Post Office Building, in the City of Las Vegas, County of Clark, State of Nevada, the above named plaintiff, Charles Lee Horsey, by and through his undersigned counsel, will move the Court for an order striking from the Answer of

said defendants to the plaintiff's Complaint, the following allegations, matters, and things, for the following reasons, and upon the following grounds, to-wit:

1. All of the purported further and separate defense set forth on page 6 of said Answer commencing on line 18 and ending on line 27; for the reason and upon the ground that said purported further and separate defense does not state facts sufficient to constitute the defense of truth, or any defense whatever to plaintiff's Complaint herein, and is irrelevant and immaterial.

2. All of the purported further and separate defense set forth on pages 6 and 7 of the Answer of said defendants commencing at line 28, page 6, and terminating at line 8 of page 7; for the reason and upon the ground that said purported further and separate defense does not state facts sufficient to constitute the defense of republication, or any defense whatever to the plaintiff's Complaint on file herein, and is irrelevant and immaterial.

3. All of the purported further and separate defense to plaintiff's Complaint commencing at line 9, page 7, and ending on line 12, page 8, of said Answer; for the reason and upon the ground that said purported defense does not state facts sufficient to constitute the defense of fair comment, or any defense whatever to the plaintiff's Complaint on file herein, and is irrelevant and immaterial.

In making the foregoing motions, the above

named plaintiff will rely upon all the pleadings and files in the above entitled action.

RALLI, RUDIAK & HORSEY

and CLYDE D. SOUTER

/s/ By GEORGE RUDIAK

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed December 9, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE FROM
ANSWER

To: Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller, and Harry E. Claiborne, individually, and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation; and J. R. Henderson, defendants above named, and

To: Gray and Horton and Milton W. Keefer, Esquires, their attorneys.

You and Each of You Will Please Take Notice that on Friday, the 12th day of December, 1952, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the court room of the above entitled court, at the United States Court and Post Office Building, in the City

of Las Vegas, County of Clark, State of Nevada, the above named plaintiff, Charles Lee Horsey, by and through his undersigned counsel, will move the Court for an order striking from the Answer of said defendants to the plaintiff's Complaint, the following allegations, matters, and things, for the following reasons, and upon the following grounds, to-wit:

1. Those certain allegations contained in Paragraph III of said Answer, commencing with the words "and in conjunction" on line 12, page 2, and ending with the words "State of Nevada" on line 16, page 2; for the reason and upon the ground that said allegations are irrelevant and immaterial.

2. All of the purported further and separate defense set forth on page 6 of said Answer commencing on line 4 and ending on line 12; for the reason and upon the ground that said purported further and separate defense does not state facts sufficient to constitute the defense of truth, or any defense whatever to plaintiff's Complaint herein, and is irrelevant and immaterial.

3. All of the purported further and separate defense set forth on page 6 of the Answer of said defendants commencing at line 13 and ending on line 25; for the reason and upon the ground that said purported further and separate defense does not state facts sufficient to constitute the defense of republication, or any defense whatever to the plaintiff's Complaint on file herein, and is irrelevant and immaterial.

4. All of the purported further and separate de-

fense to plaintiff's Complaint set forth on pages 6 and 7 of said Answer, commencing on line 26, page 6, and terminating at line 28, page 7; for the reason and upon the ground that said purported defense does not state facts sufficient to constitute the defense of fair comment, or any defense whatever to the plaintiff's Complaint on file herein, and is irrelevant and immaterial.

In making the foregoing motions, the above named plaintiff will rely upon all the pleadings and files in the above entitled action.

RALLI, RUDIAK & HORSEY
and CLYDE D. SOUTER

/s/ By GEORGE RUDIAK

Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed December 9, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND ANSWER

To: Charles Lee Horsey, Plaintiff, and to his counsel, Ralli, Rudiak & Horsey and Clyde D. Souter:

You and Each of You Will Please Take Notice that on Monday, the 15th day of December, 1952, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the above entitled court in the United States Court and Post Office Building in the City of Las Vegas, County

of Clark, State of Nevada, the above named Defendants, Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Southern Nevada Chapter, a Nevada corporation; and J. R. Henderson, by and through their counsel, W. Howard Gray and Milton W. Keefer, will move the Court for an order authorizing said Defendants to amend their Answer in the following particulars:

I.

That Paragraph IX of said Defendants' Answer be amended by changing the period at the end thereof to a semicolon, and by adding the following language:

and further answering said allegations contained in said Paragraph XI of Plaintiff's Complaint, said Defendants deny that the said paid advertisement was submitted for publication or that said paid advertisement was caused to be published by said Defendants or either or any of them.

II.

That said motion is based upon the grounds and for the reasons that certain facts have come to the attention of counsel for Defendants following the filing of the original Answer which materially changes the defenses of said Defendants, and that it is necessary for said Defendants to have their

answer so amended as to make available to them said newly discovered defense.

Dated This 10th day of December, 1952.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By W. HOWARD GRAY

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed December 10, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND ANSWER

To: Charles Lee Horsey, Plaintiff, and to his counsel, Ralli, Rudiak & Horsey and Clyde D. Souter:

You and Each of You Will Please Take Notice that on Monday, the 15th day of December, 1952, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, at the Courtroom of the above entitled court in the United States Court and Post office Building in the City of Las Vegas, County of

Clark, State of Nevada, the above named Defendants, Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Southern Nevada Chapter, a Nevada corporation; and J. R. Henderson, by and through their counsel, W. Howard Gray and Milton W. Keefer, will move the Court for an order authorizing said Defendants to amend their Answer in the following particulars:

I.

That Paragraph IX of said Defendants' Answer be amended by changing the period at the end thereof to a semicolon, and by adding the following language:

and further answering said allegations contained in said Paragraph XI of Plaintiff's Complaint, said Defendants, other than the corporation defendant, deny that the said paid advertisement was submitted for publication or that said paid advertisement was caused to be published by said Defendants, other than the corporation defendant, or either or any of them.

II.

That said motion is based upon the grounds and for the reasons that certain facts have come to the attention of counsel for Defendants following the filing of the original Answer which materially changes the defenses of said Defendants, and that

it is necessary for said Defendants to have their answer so amended as to make available to them said newly discovered defense.

Dated this 12th day of December, 1952.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

ORDER UPON PLAINTIFF'S MOTION TO
STRIKE FROM ANSWER

This matter having come before me for hearing in open Court on the 11th day of December, 1952, pursuant to Notice of Motion to Strike from Answer, filed and served by the Plaintiff herein, the Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Indi-

vidually and as Trustees of Nevada Citizens Committee, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, appearing by and through their counsel W. Howard Gray, Esq., and Milton W. Keefer, Esq., and Defendants Southwestern Publishing Co., Inc., a Nevada Corporation, A. E. Cahlan and John F. Cahlan appearing by and through their counsel Louis Wiener, Jr., Esq., and the Plaintiff appearing by and through his counsel George Rudiak and Francis D. Horsey, Esqs., and the Court being fully advised in the premises and good cause appearing therefor,

It Is Ordered, that the following allegations in Paragraph III of Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, Answer to Plaintiff's Complaint, to-wit: "and in conjunction therewith and as a further answer to said allegations, allege that the said corporation Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, is and was a non-profit corporation, and was so organized under the laws of the State of Nevada.", be, and the same are, hereby stricken from said Answer, as irrelevant and immaterial; and

It Is Ordered, that the remainder of said Motion to Strike be, and the same is, hereby denied, and those portions of said Answer subject to said mo-

tion be not stricken from the said Answer on file herein.

/s/ ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed January 5, 1953.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANTS' MOTION
TO STRIKE, MOTION FOR A MORE DEF-
INITE STATEMENT, AND MOTION TO
SEPARATELY STATE CAUSES OF AC-
TION

This matter having come before me for hearing in open Court on the 11th day of December, 1952, pursuant to Notice of Motion to Strike, Notice of Motion for a More Definite Statement, and Notice of Motion to Separately State Causes of Action, filed and served by the Defendants herein, said Defendants, Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, appearing by and through their counsel Howard Gray, Esq. and Milton W. Keefer, Esq., and Defendants Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and John F. Cahlan appearing by and through

their counsel Louis Wiener, Jr., Esq., and the Plaintiff appearing by and through his counsel George Rudiak and Francis D. Horsey, Esqs., and the Court being fully advised in the premises and good cause appearing therefor,

It Is Ordered that said Motion to Strike, Motion for a More Definite Statement and Motion to Separately State Causes of Action, be, and the same are hereby denied.

/s/ ROGER T. FOLEY
District Judge.

[Endorsed]: Filed January 5, 1953.

[Title of District Court and Cause.]

STIPULATION ON PLAINTIFF'S MOTION TO STRIKE PORTION OF COMPLAINT

It is hereby stipulated and agreed by and between the Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, by and through their counsel W. Howard Gray, Esq., and Milton W. Keefer, Esq., and the Plaintiff Charles Lee Horsey, by and through his counsel, Ralli, Rudiak & Horsey, Esqs., as follows:

That upon the hearing before this court on the

11th day of December, 1952, Plaintiff, in open court, moved that the words "as a jurist" on line 13, page 13 of Plaintiff's Complaint be stricken therefrom; that the said motion was granted without objection, and it is therefore hereby stipulated and agreed that the words hereinabove set forth be stricken from Paragraph XVI, line 13, page 13, of said Complaint.

Dated this 9th day of January, 1953.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, a Nevada Corporation; and J. R. Henderson.

RALLI, RUDIAK & HORSEY

/s/ By D. FRANCIS HORSEY

Attorneys for Plaintiff.

Approved: January 10, 1953.

/s/ ROGER T. FOLEY,
U. S. District Judge.

[Endorsed]: Filed January 10, 1953.

[Title of District Court and Cause.]

STIPULATION REGARDING DEFENDANTS' MOTION TO AMEND ANSWER

It is hereby stipulated and agreed by and between the Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson, by and through their counsel W. Howard Gray, Esq., and Milton W. Keefer, Esq., and the Plaintiff Charles Lee Horsey, by and through his counsel, Ralli, Rudiak & Horsey, Esqs., as follows:

That upon the hearing before this Court on the 11th day of December, 1952, pursuant to Notice of Motion to Amend Answer, filed and served by the Defendants hereinabove named, the said Motion was granted without objection, and it is therefore hereby stipulated and agreed that Paragraph IX of said Defendants' Answer be, and the same hereby is, amended by changing the period at the end thereof to a semicolon, and by adding the following language thereto:

and further answering said allegations contained in said Paragraph XI of Plaintiff's Complaint, said Defendants, other than the corporation defendant, deny that the said paid advertisement was submitted for publication or

that said paid advertisement was caused to be published by said Defendants, other than the corporation defendant, or either or any of them.

That this stipulated amendment to Defendants' Answer shall not disturb or in any manner affect the trial setting heretofore made by the Honorable Roger T. Foley, District Judge in this case.

Dated this 9th day of January, 1953.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

RALLI, RUDIAK & HORSEY

/s/ By D. FRANCIS HORSEY

Attorneys for Plaintiff.

Approved: January 10, 1953.

/s/ ROGER T. FOLEY,

U. S. District Judge.

[Endorsed]: Filed January 10, 1953.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Plaintiff, Charles Lee Horsey, requests the defendants Southwestern Publishing Co., Inc., A. E. Cahlan, and John F. Cahlan, severally, within ten (10) days after service of this request, to make the following Admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at time of trial:

I.

That the following advertisement exhibited with this request is genuine:

A true copy of a political advertisement concerning the candidacy of plaintiff, Charles Lee Horsey, for Justice of the Supreme Court of the State of Nevada, as published in the November 5th, 1950, Edition of the Las Vegas Review Journal.

II.

That each of the following statements is true:

(a) That the political advertisement referred to in the foregoing Request for Admission of genuineness of document was published in the Las Vegas Review Journal, November 5, 1950 Edition.

(b) That on November 5, 1950, and for some months prior thereto, the defendant Southwestern Publishing Co., Inc., was the owner, proprietor, and

publisher of the newspaper known as the Las Vegas Review Journal.

(c) That the defendant A. E. Cahlan was on November 5, 1950, and for some months prior thereto, a member of the Board of Directors of the defendant Southwestern Publishing Co., Inc., and also the Managing Director of the Las Vegas Review Journal.

(d) That the defendant John F. Cahlan was on November 5, 1950, and for some months prior thereto, Editor of the Las Vegas Review Journal.

(e) That on November 5, 1950, the plaintiff, Charles Lee Horsey, was Chief Justice of the Supreme Court of the State of Nevada.

(f) That the advertisement, a copy of which is attached hereto, and which is referred to in the above Request for Admission of genuineness of document, was printed and published in all copies of the Las Vegas Review Journal, November 5, 1950 Edition, as a paid advertisement.

(g) That the document, a copy of which is attached hereto, and which is referred to in the above Request for Admission of genuineness of document was submitted to the Las Vegas Review Journal for publication by a representative of the defendant Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation.

(h) That the annual salary of the office of Jus-

tice of the Supreme Court of the State of Nevada was \$8,000.00 during the years 1950 and 1951.

RALLI, RUDIAK & HORSEY
and CLYDE D. SOUTER

/s/ By D. FRANCIS HORSEY
Attorneys for Plaintiff.

[Printer's Note: Copy of advertisement attached is the same as set out at pages 10-13 of this printed record.]

Acknowledgment of Service attached.

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

The plaintiff, Charles Lee Horsey, requests the defendants Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller, Harry E. Claiborne, and J. R. Henderson, severally, within ten (10) days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at time of trial:

I.

That the following advertisement exhibited with this request is genuine:

A true copy of a political advertisement concern-

ing the candidacy of plaintiff, Charles Lee Horsey, for Justice of the Supreme Court of the State of Nevada, as published in the November 5th, 1950, Edition of the Las Vegas Review Journal.

II.

That each of the following statements is true:

(a) That the political advertisement referred to in the foregoing Request for Admission of genuineness of document was published in the Las Vegas Review Journal, November 5, 1950 Edition.

(b) That on November 5, 1950, the plaintiff, Charles Lee Horsey, was Chief Justice of the Supreme Court of the State of Nevada.

(c) That the advertisement, a copy of which is attached hereto, and which is referred to in the above Request for Admission of genuineness of document, was printed and published in all copies of the Las Vegas Review Journal, November 5, 1950 Edition, as a paid advertisement.

(d) That the document, a copy of which is attached hereto, and which is referred to in the above Request for Admission of genuineness of document was submitted to the Las Vegas Review Journal for publication by a representative of the defendant Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation.

(e) That the annual salary of the office of Justice of the Supreme Court of the State of Nevada was \$8,000.00 during the years 1950 and 1951.

(f) That the Las Vegas Review Journal was on November 5, 1950, and for some months prior thereto, a newspaper published in Clark County, Nevada, and was circulated in Clark County, Nevada, as well as in other portions of the State of Nevada.

(g) That one of the purposes of the Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, was to influence the electorate of Southern Nevada to vote for certain candidates for public office and to vote against certain other candidates for public office.

(h) That one of the purposes of the advertisement, a copy of which is attached hereto and which is above referred to in the Request for Admission of genuineness of document, was to influence the voters of Southern Nevada to vote against the plaintiff, Charles Lee Horsey, with respect to his candidacy for Justice of the Supreme Court of the State of Nevada in the election of November 7, 1950.

RALLI, RUDIAK & HORSEY and
CLYDE D. SOUTER

/s/ By D. FRANCIS HORSEY,
Attorneys for Plaintiff.

[Printer's Note: Copy of advertisement attached is the same as set out at pages 10-13 of this printed record.]

Acknowledgment of Service attached.

[Endorsed]: Filed January 18, 1954.

[Title of District Court and Cause.]

OBJECTIONS TO REQUEST FOR ADMISSIONS

Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller, Harry E. Claiborne and J. R. Henderson object to that portion of the matter set forth in statement II (f) of Plaintiff's request for admission of facts, served upon them on January 16, 1954, wherein it is stated that the Las Vegas Review Journal was on November 5, 1950, circulated in portions of the State of Nevada other than Clark County, Nevada, upon the grounds that they cannot truthfully admit or deny the said statement because they have no actual, direct or competent knowledge of the truthfulness of the facts contained therein.

The said defendants object to paragraph II (g) of said request for admission on the grounds (1) that the same refers to immaterial and irrelevant matters in that the purposes of the Nevada Citizens Committee, Incorporated, Southern Nevada Chapter is irrelevant and immaterial and no evidence thereof would be properly receivable in evidence upon the trial of this action and that the purposes of the Nevada Citizens Committee, Incorporated is outside the issues raised by the pleadings herein; and (2) that the said statement is ambiguous in that the terms "certain candidates" and

“certain other candidates” are without meaning insofar as the issues in this case are concerned, and (3) the statement is too general and ambiguous to be subjected to the requirement of an admission or denial.

W. HOWARD GRAY &
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

To: Ralli, Rudiak & Horsey and Clyde D. Souter, Attorneys for Plaintiff, 201-203 Professional Building, 425 Fremont Street, Las Vegas, Nevada.

NOTICE OF HEARING

Please take notice that the undersigned will bring the foregoing Objections to Request for Admission on for hearing before this Court on the 5th day of February, 1954, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the Court room of this Court in the courthouse at Las Vegas, Clark County, Nevada.

Dated: January 26, 1954.

W. HOWARD GRAY &
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada corporation, A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller, Harry E. Claiborne and J. R. Henderson hereby waive their Objections to Request for Admissions heretofore filed herein and respond to said Request for Admissions as follows:

1. Statements numbered II (a), (b), (c), (d), (e) and (h) are admitted.
2. Referring to statement numbered II (f), De-

fendants admit that at the time and during the period stated the Las Vegas Review-Journal was a newspaper published in Clark County, Nevada, and was circulated principally in Clark County, Nevada, with a small circulation outside said county.

3. Referring to statement numbered II (g), Defendants deny said statement. Defendants do, however, admit that one of the activities of the Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, for a period prior to the 1950 general election, was to attempt to influence the electorate of Southern Nevada to vote against candidates for public office believed to be opposed to the principles espoused by said corporation.

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER

Attorneys for Defendants Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; A. W. Blackman, Vern Willis, Frank M. Bollig, Abe Miller and Harry E. Claiborne, Individually and as Trustees of Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a Nevada Corporation; and J. R. Henderson.

Acknowledgment of Service attached.

[Endorsed]: Filed February 1, 1954.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled case, find in favor of the plaintiff and against the defendants in the amount of \$10,000.00 as compensatory damages, and \$15,000.00 as punitive damages.

Dated: This 28th day of September, 1954.

/s/ BARBARA HALL,
Foreman.

[Endorsed]: Filed September 28, 1954.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the

law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just a little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive about having the jury undertake to determine what is the law of the case. With this understanding of our respective duties, the Court states to you the following general principles.

Given: Roger T. Foley, Judge.

Instruction No. 2

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Given: Roger T. Foley, Judge.

Instruction No. 3

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such ruling and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting

evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness.

Given: Roger T. Foley, Judge.

Instruction No. 4

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

Given: Roger T. Foley, Judge.

Instruction No. 5

In civil actions, and this is a civil case, the party who asserts the affirmative of an issue must carry the burden of proving it. In other words the "burden of proof" as to that issue is on that party. This means that if no credible evidence were given on either side of such issue, your finding as to it would have to be against the party asserting it. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence on either side of the issue be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

Given: Roger T. Foley, Judge.

Instruction No. 6

You are instructed that the defendants have admitted and you are to take as true that at the time of the publication of the advertisement in evidence herein as Plaintiff's Exhibit 3, the defendant Southwestern Publishing Company was a corporation and the owner and publisher of the newspaper known as the Las Vegas Review-Journal, which was widely circulated in Clark County, Nevada, and other counties of the State of Nevada and elsewhere, and at the time of the publication of the advertisement claimed to be libelous had a daily circulation of approximately 14,000 copies.

The defendant A. E. Cahlan was Managing Director of the defendant Southwestern Publishing Company and as such Managing Director had active control over the management and policy of the Las Vegas Review-Journal and the activities of its employees, and that it was his duty and responsibility to edit all printed matter published in the newspaper and to ascertain the truth of such matter in advance of publication and exclude from publication all untruthful and libelous matters. His absence or lack of knowledge of such publication would not relieve him from such responsibilities.

Defendant Nevada Citizens Committee Incorporated, Southern Nevada Chapter, was a corporation incorporated under the laws of the State of Nevada.

That during many years of residence in the State of Nevada, the plaintiff held numerous public offices of honor, confidence and trust; that is, as District Attorney of Lincoln County, Nevada, from

1906 to 1909, as State Senator from Lincoln County, Nevada, from 1913 to 1914; as District Judge of the Tenth Judicial District Court in and for the Counties of Lincoln and Clark, from 1915 to 1919; as State Senator from Clark County, 1939 to 1940; as District Judge of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, from 1915 to 1919; as State Senator from Clark County, 1939 to 1940; as District Judge of the Eighth Judicial District Court of the State of Nevada in and for the County of Clark, June to October, 1945; as Justice of the Supreme Court of the State of Nevada, commencing October, 1945, and culminating with the office of Chief Justice of the Supreme Court of the State of Nevada, until January 1, 1951; and that plaintiff has served a total of 9 years, 8 months, on the Bench of the District Court and of the Supreme Court of the State of Nevada.

That defendant Nevada Citizens Committee submitted to defendant Southwestern Publishing Company, Inc., for publication in the Las Vegas Review-Journal as a paid advertisement the advertisement in evidence in plaintiff's Exhibit 3, and that defendant Southwestern Publishing Company, Inc. and defendant A. E. Cahlan published the same in the Sunday, November 5, 1950, issue of the Las Vegas Review-Journal.

That the plaintiff's name was printed entirely in lower case letters in the advertisement.

That the advertisement filed as Plaintiff's Exhibit 3 was published in all copies of the Sunday,

November 5, 1950, edition of the Las Vegas Review-Journal.

That the advertisement in evidence as Plaintiff's Exhibit 3 was paid for by the defendant Nevada Citizens Committee.

That defendant A. E. Cahlan was at the time of publication of the advertisement, a member of the Nevada Citizens Committee Incorporated, Southern Nevada Chapter.

That one of the activities of defendant Nevada Citizens Committee for a period prior to the 1950 General Election, was to attempt to influence the electorate of Southern Nevada to vote against candidates for public office believed to be opposed to the principles espoused by said corporation.

Given: Roger T. Foley, Judge.

Instruction No. 7

The alleged defamatory matter is before you here as Exhibit 3 admitted in evidence. If you find that the language contained therein, or any portion thereof, either by the common use made of the language within Clark County, Nevada, or by the acceptance of the terms or assertions contained in said exhibit, imputed attributes to the plaintiff which would naturally tend to degrade him in the estimation of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business, occupation or profession, you should find that the plaintiff is entitled to your verdict for actual damages; and in addition, if you should further find that a defendant or defendants, in mak-

ing such publication, was or were actuated by a feeling of spite, or ill will or disposition to injure, you may, under such circumstances, grant to the plaintiff punitive damages. However, if you further find from the evidence that the defendants were not actuated by express malice and you further find that the language contained in Exhibit 3 was privileged matter or constituted fair comment, then the plaintiff will not be entitled to recover against any of the defendants and your verdict should be for the defendants.

Given: Roger T. Foley, Judge. .

Instruction No. 8

While in a legal sense the malice requisite to constitute libel is implied in the publication of untrue defamatory matter, and further proof thereof, so far as concerns the question of actual damages, is not required, not so when we come to consider the propriety of imposing a penalty or inflicting punitive damages. You cannot award exemplary or punitive damages except for actual malice, or, as is sometimes said, express malice. To constitute such malice the defendants whom you have under consideration must have been actuated by a feeling of spite, or ill will, or disposition to injure, or the wrongful action must have been so grossly negligent, so wanton, as to import a willingness on the part of the wrongdoer to injure others—a recklessness of the rights of others implying a wilful disregard of them.

Given: Roger T. Foley, Judge.

Instruction No. 9

In regard to the question of privilege or fair comment, you are instructed that the mere fact that a man is a public officer, or is a candidate for public office, does not constitute a warrant, either to the ordinary citizen or to a newspaper, to spread false charges against him of criminal acts or disgraceful conduct. In a sense, in becoming a candidate, a man invites close scrutiny and opens his life to the light of publicity. Within the range of good faith a newspaper or a citizen may properly disclose to the public and advise the electorate of the state of his every act and utterance, and criticize and comment thereon, even with severity and suggest any reasonable inference or implication therefrom bearing upon the fitness or qualification faithfully or efficiently to discharge his duties as a public officer, or his qualifications for the office which he seeks. But the distinction must be drawn between comment and criticism, and untrue charges of facts constituting a crime or disgraceful conduct. It is one thing to pass severe criticism upon, or to draw even extreme inferences from, acknowledged facts, or to indulge in intemperate denunciation, even though bitter, and quite another thing to assert the existence of particular acts of criminality or of shameful misconduct upon the candidate's part. Neither the newspaper nor the citizen may with impunity falsely charge the candidate or the public officer with specific acts of criminality or shameful misconduct, either in the form of an

advertisement or matter copied from another newspaper.

Given: Roger T. Foley, Judge.

Instruction No. 10

Exhibit 3 should be considered by you as a whole and must be read and construed in the sense in which the readers to whom it was addressed would ordinarily understand it. In determining whether the publication of Exhibit 3 was actuated by a feeling of spite or ill will or disposition to injure, you are entitled to consider all the facts and circumstances here in evidence and such inferences as may be fairly made from the matters before you.

Given: Roger T. Foley, Judge.

Instruction No. 11

If you find from the evidence that the plaintiff is entitled to recover in this action, it will then be your duty to assess the amount of damages which in your judgment he should recover. You then may take into consideration the extent of the circulation given to the article published in defendants' newspaper, the rank, standing and position of the plaintiff in his profession, the injury, if any, you find to his fame and reputation, the grief, anguish, mental suffering, mortification and humiliation which the plaintiff has undergone and suffered by reason of the article, if you believe from the evidence that his fame and reputation were injured and that he did suffer grief, anguish, mental suffering, mortification or humiliation. You should as-

sess his damages in such an amount as in your judgment would compensate him for the injury sustained as the proximate result of the publication.

However, only such damages should be awarded as are the direct and proximate result of the libel, and remote or speculative damages are not to be considered.

Given: Roger T. Foley, Judge.

Instruction No. 12

You are instructed that there are two classes of damages in actions for libel, namely, compensatory damages and exemplary or punitive damages.

By compensatory damages is meant actual damages or such damages as will compensate a person for injury he may have actually sustained by reason of a libel.

Exemplary damages are such damages as the law says may be given in certain cases in addition to actual damages for the sake of example and by way of punishing a defendant.

Given: Roger T. Foley, Judge.

Instruction No. 13

One whose election to office is alleged to have been defeated by the publication of a libel cannot recover damages resulting from the loss of an election. Damages based upon the loss of an election are too speculative and uncertain to be considered by the jury.

Given: Roger T. Foley, Judge.

Instruction No. 14

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your minds, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

Given: Roger T. Foley, Judge.

Instruction No. 15

In judging the credibility of witnesses you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the man-

ner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his or her testimony in other particulars.

Discrepancy in a witness' testimony or between his testimony and that of others, if there were any, does not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

Given: Roger T. Foley, Judge.

Instruction No. 16

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion

when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Given: Roger T. Foley, Judge.

Instruction No. 17

It takes twelve to find a verdict. The Clerk, as a matter of convenience, has prepared forms of verdict which will be handed to you.

In the event that you find for the plaintiff and against the defendants, you may return a verdict as follows: "We, the jury in the above entitled case, find in favor of the plaintiff and against the defendants in the amount of \$. as compensatory damages."

Also, in the event you find for the plaintiff and further find that the alleged libel was actuated by express malice, you will ignore the above form of verdict and your verdict may be as follows: "We, the jury in the above entitled case, find in favor of the plaintiff and against the defendants in the amount of \$. as compensatory damages, and \$. as punitive damages."

If you find in favor of the defendants, your verdict may be as follows: "We, the jury in the above

entitled case, find against the plaintiff and in favor of the defendants.”

When you retire to the jury room to deliberate you will select one of your number as foreman and he or she will sign your verdict for you. You will then return into court with the verdict. Your foreman will represent you as your spokesman in the further conduct of this case in the court.

Given:

/s/ ROGER T. FOLEY,
United States District Judge

[Endorsed]: Filed September 28, 1954.

[Title of District Court and Cause.]

COPY OF CIVIL DOCKET ENTRY OF
SEPTEMBER 28, 1954

September 28, 1954—Entg. Judgment: Judgment: Judgment is hereby entered in favor of the plaintiff and against the defendants in the amount of \$10,000.00 as compensatory damages, and \$15,000.00 as punitive damages.

September 29, 1954. Counsel notified of above entry of judgment.

A true copy from the records.

Attest:

[Seal]

AMOS P. DICKEY,
Clerk.

/s/ By RAY MONA SMITH,
Deputy.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above entitled action on the 28th day of September, 1954, against the defendants, the clerk is requested to tax the following as costs:

Bill of Costs

Fees of the clerk: \$15.80.

Fees of the marshal: \$21.00.

Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case: \$62.10.

Fees for witnesses (itemized on reverse side): \$8.50.

Fees for exemplification and copies of papers necessarily obtained for use in case: \$34.82.

Docket fees under 28 U.S.C. 1923: \$42.50.

Costs incident to taking of depositions: \$434.30.

Total: \$619.02.

State of Nevada,
County of Clark—ss.

I, George Rudiak, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Jones, Wiener & Jones, Esq., and Milton

W. Keefer, Esqs., with postage fully prepaid thereon.

/s/ GEORGE RUDIAK,
One of Attorneys of Charles Lee
Horsey, Plaintiff

Subscribed and sworn to before me this 1st day of October, A.D. 1954, at Las Vegas, Clark County, Nevada.

[Seal] /s/ MILDRED H. LEAVITT,
Notary Public in and for said
County and State

Costs are hereby taxed in the amount of \$619.02 this 4th day of October, 1954, and that amount included in the judgment.

/s/ AMOS P. DICKEY, Clerk
/s/ By O. F. PRATT, Deputy Clerk

(Reverse side)

Witness Fees: J. R. Henderson, attendance cost, \$4.00; mileage, \$.25; total: \$4.25. William V. Wright, attendance cost, \$4.00; mileage, \$.25; total, \$4.25. Total, \$8.50.

[Endorsed]: Filed October 1, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendants herein, Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, move the Court for an order setting aside the verdict and the judgment and granting a new trial upon the following grounds:

1. That the damages awarded by the verdict are grossly excessive.

2. That the damages awarded by the verdict are contrary to law.

3. That the verdict is contrary to law.

4. That the verdict is contrary to the evidence.

5. That the verdict is contrary to the law and the evidence.

6. That the verdict is excessive and appears to have been given under the influence of passion and prejudice.

7. That the Court erred in admitting irrelevant, incompetent and prejudicial testimony offered by the plaintiff over defendants' objection as follows: The election returns for Clark County for 1946 and 1950, showing the number of votes cast in each of said elections for the office of Justice of the Supreme Court.

8. That there is no sufficient or substantial evi-

dence tending to support the amount of the jury's verdict.

Dated at Las Vegas, Nevada, this 8th day of October, 1954.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Defendants Southwestern Publishing Co., Inc., a Nevada corporation, and A. E. Cahlan, 230 South Fifth Street, Las Vegas, Nevada, and

W. HOWARD GRAY and
MILTON W. KEEFER

/s/ By MILTON W. KEEFER,

Attorneys for Nevada Citizens Committee Incorporated, Southern Nevada Chapter, Suite 1, Cornet Building, Las Vegas, Nevada.

Acknowledgment of Service attached.

[Endorsed]: Filed October 8, 1954.

[Title of District Court and Cause.]

BOND

Know All Men by These Presents:

That we, Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, as principal, and

Royal Indemnity Company, a corporation organized under the laws of the State of New York, engaged and authorized to engage in, the business of acting as Surety on judicial and other bonds in the State of Nevada, as surety, are held and firmly bound unto the State of Nevada, in the sum of Fifty five thousand (\$55,000.00) Dollars, to be paid to Charles Lee Horsey, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated October 12, 1954.

Whereas, lately in a suit pending in the United States District Court for the District of Nevada, between the above named plaintiff and defendants, a judgment was rendered against said defendants and said defendants having filed a notice of appeal to reverse the judgment on appeal to the United States Court of Appeals for the Ninth Circuit.

Now the condition of this obligation is such that if said defendants shall satisfy the judgment in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, or if defendants shall satisfy any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation to be void; else to remain in full force and effect.

In Witness Whereof, said Principal and Surety

have hereunto set their hands and seals this 12th day of October, 1954.

SOUTHWESTERN PUBLISHING
CO., INC.

/s/ By A. E. CAHLAN, Vice-President.

/s/ A. E. CAHLAN,

NEVADA CITIZENS COMMITTEE
INCORPORATED, SOUTHERN
NEVADA CHAPTER

/s/ By JACK L. YOUNG, Principal.

ROYAL INDEMNITY COMPANY

/s/ By [Illegible], Surety.

Acknowledgment of Service attached.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

COURT MINUTE ORDER, DEC. 29, 1954

This being the time heretofore fixed for hearing on Defendant's Motion to Retax Costs and Motion for New Trial, and the same coming on regularly this day. Messrs. Frances D. Horsey and Samuel S. Lionel, of the firm of Ralli, Rudiak and Horsey, appear for and on behalf of the Plaintiff. Louis Wiener, Jr., Esq., of the firm of Jones, Wiener and Jones appears for and on behalf of the defendant Southwestern Publishing Company, Inc., Milton W. Keefer, Esq. appears for the defendant Nevada Citizens Committee, Inc. Upon Motion of Mr. Wie-

ner, It Is Ordered that the Motion to Retax Costs be, and the same hereby is, withdrawn. The Motion for New Trial now comes on for hearing. Following arguments of counsel, It Is Ordered that the Motion for New Trial be, and the same hereby is, denied.

A true copy from the records. Attest:

[Seal]

AMOS P. DICKEY, Clerk

/s/ By RAY MONA SMITH, Deputy

In the District Court of the United States in and
for the District of Nevada

Case No. 1025

CHARLES LEE HORSEY, Plaintiff,

vs.

SOUTHWESTERN PUBLISHING CO., INC.,
a Nevada corporation; A. E. CAHLAN, NE-
VADA CITIZENS COMMITTEE INCOR-
PORATED, SOUTHERN NEVADA CHAP-
TER, a Nevada corporation, Defendants.

ORDER DENYING DEFENDANTS' MOTION
FOR NEW TRIAL

This matter coming on regularly to be heard on this 29th day of December, 1954, upon the motion of the Defendants for an Order Setting Aside Verdict and Judgment herein and Granting New Trial, the Plaintiff appearing by and through D. Francis Horsey and Samuel S. Lionel, his attorneys, and Defendants Southwestern Publishing

Co., Inc., a Nevada corporation, and A. E. Cahlan appearing by and through Louis Wiener, Jr., of the firm of Jones, Wiener & Jones, their attorneys, and Defendant Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, appearing by and through Milton W. Keefer, its attorney; and the Court having heard arguments of counsel in support of said Motion, and the Court being fully advised in the premises, and it appearing to the Court that said Motion should be denied, it is therefore

Ordered that said Motion be, and the same is hereby denied.

Dated this 29th day of December, 1954.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER DENY-
ING DEFENDANTS' MOTION FOR NEW
TRIAL

To: Southwestern Publishing Co., Inc., a Nevada corporation, and to A. E. Cahlan and to Jones, Wiener & Jones, their attorneys, and

To: Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, and to Milton W. Keefer, its attorney.

You and Each of You Will Please Take Notice, that the Clerk of the above entitled Court did on

the 29th day of December, 1954, enter the Court's Order, a copy of which is attached hereto, denying Defendants' motion for new trial.

Dated this 29th day of December, 1954.

RALLI, RUDIAK & HORSEY and
CLYDE D. SOUTER,

Of Counsel

/s/ By D. FRANCIS HORSEY,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Charles Lee Horsey, and

To: Ralli, Rudiak & Horsey and Clyde D. Souter,
attorneys:

You and Each of You Will Please Take Notice that Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan, and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order denying defendants' motion for a new trial and from the final judgment entered in this action on the 29th day of December, 1954.

Dated at Las Vegas, Nevada, this 21st day of January, 1955.

JONES, WIENER & JONES

/s/ By LOUIS WIENER, JR.

Attorneys for Defendants Southwestern Publishing Co., Inc. and A. E. Cahlan.

BRUCE R. THOMPSON and

MILTON W. KEEFER,

/s/ By MILTON W. KEEFER,

Attorney for Defendant Nevada Citizens Committee Incorporated, Cornet Building, Las Vegas, Nevada.

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Know All Men by These Presents:

That the undersigned, United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, with its principal place of business in the City of Baltimore, State of Maryland, as surety, is held and firmly bound unto Charles Lee Horsey, respondent in the above entitled action, in the penal sum of \$250.00, lawful money of the United States of America, for the payment of which sum well and

truly to be made the undersigned binds itself by these presents.

Dated, this 26th day of January, 1955.

The condition of this obligation is such that whereas Southwestern Publishing Co., Inc., a Nevada corporation, A. E. Cahlan and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, are about to appeal to the United States Court of Appeals for the Ninth Circuit from the order denying defendants' motion for a new trial and from the final judgment thereon,

Now, Therefore, if the said Southwestern Publishing Co., Inc., A. E. Cahlan and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, appellants, shall pay all damages and costs which may be awarded against them on said appeal, then this obligation shall be void, otherwise to remain in full force and effect.

UNITED STATES FIDELITY &
GUARANTY CO.

/s/ By [Illegible]

Attorney-in-Fact.

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

**ORDER EXTENDING TIME TO FILE AND
DOCKET RECORD ON APPEAL**

It being made to appear to the Court that the time to file and docket the record on appeal in this case in the United States Court of Appeals for the Ninth Circuit is about to expire,

It Is Ordered that the time to file and docket the record on appeal herein in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including April 25, 1955.

Dated this 1st day of March, 1955.

/s/ ROGER T. FOLEY

United States District Judge.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the following and accompanying documents and exhibits listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties:

1. Complaint for Damages.
2. Summons, with Marshal's Return attached thereto.
3. Notice of Motion to Separately State Causes of Action.
4. Notice of Motion for a More Definite Statement.
5. Notice of Motion to Strike.
6. Notice of Motion to Separately State Causes of Action.
7. Notice of Motion for a More Definite Statement.
8. Notice of Motion to Strike.
9. Answer of Nevada Citizens Committee, etc.
10. Answer of Southwestern Publishing Co., etc.
11. Notice of Motion to Strike from Answer to Southwestern Publishing Co., etc.
12. Notice of Motion to Strike from Answer to Nevada Citizens Committee, etc.
13. Notice of Motion to Amend Answer filed December 10, 1952.
14. Notice of Motion to Amend Answer filed December 12, 1952.
15. Order upon Plaintiff's Motion to Strike from Answer.
16. Order Denying Defendants' Motion to Strike, Motion for a More Definite Statement, and Motion to Separately State Causes of Action.
17. Stipulation on Plaintiff's Motion to Strike Portion of Complaint.
18. Stipulation Regarding Defendants' Motion to Amend Answer.

19. Request for Admissions, Southwestern Publishing Co., etc.

20. Request for Admissions, Nevada Citizens Committee, etc.

21. Objections to Request for Admissions.

22. Response to Request for Admissions.

23. Court's Instructions to Jury Nos. 1 to 17, inclusive and Verdict, filed September 28, 1954.

24. Copy of Civil Docket Entry of September 28, 1954.

25. Plaintiff's Cost Bill.

26. Motion for New Trial.

27. Order Denying Defendants' Motion for New Trial.

28. Notice of Entry of Order Denying Defendants' Motion for New Trial.

29. Order Extending Time to File and Docket Record on Appeal.

30. Copy of Court Minute Order.

31. Stipulation regarding Amending of Designation of Record on Appeal.

32. Undertaking on Appeal, filed January 26, 1955.

33. Supersedeas Bond.

34. Notice of Appeal.

35. Reporter's Transcript.

36. Plaintiff's Exhibit No. 1, filed September 27, 1954.

37. Plaintiff's Exhibit No. 2, filed September 27, 1954.

38. Plaintiff's Exhibit No. 3, filed September 27, 1954.

39. Plaintiff's Exhibit No. 5, filed September 28, 1954.

40. Defendant's Exhibit "A", filed September 28, 1954.

41. Amended Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of April, A. D. 1955.

[Seal] AMOS P. DICKEY,
Clerk.

/s/ By RAY MONA SMITH,
Deputy Clerk.

In the District Court of the United States in and
for the District of Nevada

Case No. 1025

CHARLES LEE HORSEY, Plaintiff,

vs.

SOUTHWESTERN PUBLISHING CO., INC.,
et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that the above-entitled case came on regularly for hearing before the Court at Las Vegas, Clark County, Nevada, on Monday, September 27, 1954, before Hon. Roger T. Foley, Chief District Judge, in and for the District of Nevada.

Appearances: For the Plaintiff: Ralli, Rudiak & Horsey, 200-203 Professional Bldg., 425 Fremont St., Las Vegas, Nevada, by D. Francis Horsey; Clyde D. Souter, Byington Bldg., Reno, Nevada. For the Defendants: Jones, Wiener & Jones, 230 South Fifth St., Las Vegas, Nevada, by Louis Wiener, Jr.

The Court: This is the case of Charles Lee Horsey vs. the Southwestern Publishing Company, Inc., are we ready to proceed?

Mr. Souter: Ready for the plaintiff.

Mr. Thompson: The defendants are ready, your Honor. [1*]

The Court: It might be well if we have the representations, for the record.

Mr. Souter: Clyde D. Souter, counsel for the plaintiff.

Mr. Horsey: D. Francis Horsey, counsel for the plaintiff.

Mr. Wiener: Louis Wiener, Jr., of Jones, Wiener and Jones, for the Southwestern Publishing Company and A. E. Cahlan.

Mr. Thompson: Bruce R. Thompson, for the Nevada Citizens Committee, Incorporated, Southern Nevada Chapter.

Mr. Keefer: Milton W. Keefer, for the Nevada Citizens Committee, Southern Nevada Chapter.

The Court: The clerk will call the roll of the venire.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Roll call of jurors)

(Selection of Jury completed at 11:25 a.m. as follows:) Phyllis Predovich, John M. Brothers, Kenneth Varner, Barbara Hall, Gladys Alley, Louis C. Pico, [2] Walter L. Botts, Gertrude Snowden, Melva Eyre, Norman E. Shurtliff, Mack W. Lyon, Helen M. Belding, Patrick J. Balance (alternate).

(Recess taken, remaining jurors excused until next trial.)

The Court: Will counsel stipulate all members of the Jury are present, and the alternate?

(So stipulated by counsel)

The Court: I think it is time now for the opening statement.

(D. Francis Horsey opened on behalf of the plaintiff, to the jury.)

(Counsel on behalf of defendants reserved their right to make an opening statement.)

The Court: We will take our noon recess at this time, until two o'clock this afternoon.

(Recess taken at 11:50 a.m.)

Afternoon Session, 2:00 o'clock p.m.

The Court: Will counsel stipulate that all [3] members of the Jury, including the alternate, are present?

(So stipulated by counsel)

The Court: You may proceed.

CHARLES LEE HORSEY, SR.

having been first duly sworn, took the stand and testified as follows:

Direct Examination

Q. (By Clyde D. Souter): Will you state your name, please? A. Charles Lee Horsey.

Q. And are you the plaintiff in this action?

A. I am.

Q. Where do you reside at the present time?

A. On La Vereda Road, known as Monticido, Santa Barbara, California.

Q. And how long have you resided there?

A. Well, since June of 1951.

Q. Are you a registered voter of California?

A. I am.

Q. Did you vote at the 1952 general election in the state of California? [4] A. I did.

Q. And had you registered as such voter in the state of California before July 22, 1952?

A. Either right at the end of June or about, just before the fourth of July, of that year, and that was before the general election. And before this case was filed. Considerably before.

Q. When did you come to the state of Nevada?

A. In January of 1905.

Q. And where did you come when you came to Nevada?

A. Well, for a short time I was practicing in Spokane, Washington, for a few months, and learning about the great activities of Goldfield and Tonopah, with the lure of mining and so on, and since

(Testimony of Charles Lee Horsey, Sr.)

I was a young man, why, I decided to come to Southern Nevada.

Q. And where did you go, in Southern Nevada?

A. Into Pioche, Lincoln County.

Q. At that time was Clark County a part of Lincoln County? A. It was.

Q. Were you admitted to the bar of Nevada?

A. I was admitted to the bar in February, I [5] think February the 13th, but anyway, in February, of 1905. A little over a month after I came.

Q. And did you begin the practice of law in Pioche, Lincoln County, Nevada?

A. Yes, sir.

Q. And were you elected district attorney of Lincoln County?

A. First I was appointed by the county commissioners, upon the death of the then district attorney. And in a few months it was incumbent upon me to enter into a campaign for the election, which I did, and in 1906——

Q. You were elected?

A. I was. By, well, I carried all the precincts except two, and what would be now the two counties, was then all Lincoln County.

Q. Were you a member of the State Senate of Nevada, from Lincoln County?

A. In 1913 I was.

Q. And when in the State Senate of Nevada, what committee did you head?

A. I was then the only attorney in the State

(Testimony of Charles Lee Horsey, Sr.)

Senate. I had been chosen to be chairman of the judiciary committee, and I did so.

Q. Were you subsequently district judge of the tenth judicial district of Nevada? [6]

A. I was. For four years.

Q. Did that include Lincoln and Clark county at that time? A. It did.

Q. Were you also state senator from Clark county?

A. Several years later, in 1939, I had been appointed and served as state senator from Clark county, upon the death of the then state senator.

Q. Were you district judge of the eighth judicial district of Nevada?

A. Yes, for a short time.

Q. That was in Clark county?

A. Yes, sir. Shortly before I went up to the Supreme Court.

Q. And do you recall any action on the part of the bar of Clark County which lead to your appointment as district judge?

Mr. Thompson: Just a moment, if the Court please, I would like to interpose an objection to that question, your Honor, on the ground it is wholly irrelevant, immaterial, and doesn't bear upon the issues in this case.

The Court: The objection will be sustained.

Mr. Souter: Q. Were you subsequently a justice of the Nevada Supreme Court? [7]

A. I was.

Q. And was that also by appointment?

(Testimony of Charles Lee Horsey, Sr.)

A. At first. Orr, who only had been reelected and serving a short time, was elevated to the United States Court of Appeal, and then resigned and I was appointed first by Governor Pittman, as Supreme Court Justice.

Q. And did you subsequently run as candidate for that office? A. I did. In 1946.

Q. And were you elected?

A. I was, thanks to a large majority of Clark County.

Q. And do you recall that at that time you received about seventy-five per cent of the vote of Clark County?

Mr. Thompson: I would like to object to that question on the ground it is irrelevant, immaterial, and it pertains to an element of damages that is wholly speculative. It has nothing to do with the issues in this case.

The Court: I can't see where it has any bearing.

Mr. Thompson: If the Court please, it seems to me the mere fact that he was elected, I think, would be sufficient.

Mr. Souter: Well, may I be heard, sir? [8]

The Court: The ruling stands.

Mr. Souter: Q. Are you an honorary member of the State bar of the State Bar of Nevada?

A. Yes, sir. In 1945 I received a certificate, because of having served forty years, and I received a very nice certificate in regards to having served forty years, in good standing, as a member of the Bar.

(Testimony of Charles Lee Horsey, Sr.)

Q. At this time, if the Court please, I would like to offer in evidence, the case of the State of Nevada, on the relationship of culinary union local number two two six, Alan Shore, aka John Doe I and Vivian Shore, aka Jane Doe I, against the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, and the Honorable A. S. Henderson, Judge of Department Two, thereof, respondents, in Volume 66 of the Nevada Reports, at page 166.

Mr. Thompson: We would like to object to the offer, your Honor, upon the ground that the evidence is incompetent, that it relates to a decision of a case which decision purports to set forth legal reasons for the conclusions reached, that it is the province of the Court, rather than the Jury, to determine matters of that character, and that if anything of that nature involved in that case is material to the issues which the jury will decide here, that those matters should be covered by instructions to the Court rather than by reception in evidence, in the Volume of Nevada Reports.

Court: That's the so-called White Cross case, is it? The objection will be overruled. The exhibit will be admitted in evidence. Plaintiff's Exhibit I.

Mr. Souter: Expressly not for the purpose of showing the loss of an election, but for the sole purpose of indicating a state of opinion in Clark County, I would now like to offer in evidence, the official returns of the general election of the state of Nevada for the year 1946, and the official re-

(Testimony of Charles Lee Horsey, Sr.)

turns of the general election of the state of Nevada of 1950, insofar as those returns indicate the vote in Clark County, in those two elections, for Mr. Justice Horsey, for Justice of the Supreme Court of Nevada.

Mr. Thompson: We would like to object to the offer just made, your Honor, on the ground that the offer of evidence offered is wholly irrelevant and immaterial. Judge Souter's offer recognizes his and our understanding of the law, that the loss of an election is not a proper element of damages in a case of that character, because it's too speculative and remote, and no one can properly judge the reasons why a person wins or loses an election, for all of the reasons which go together to achieve that result. Now, if that is the law, as we understand it to be, the evidence offered is doubly immaterial for the purpose suggested by Judge Souter and is doubly speculative and remote and incompetent, [10] because if the loss of the election itself is immaterial in this case, well, the reaction of the voters in any particular area of this state, is equally immaterial, speculative, remote, and incompetent.

The Court: I should think that the 1950 election returns might be admitted, but I can't see any relevance to the 1946 returns.

Mr. Souter: For the purpose of the contrast.

The Court: Well, we know he was elected in 1946. It has already been testified to.

Mr. Souter: But my thought in that connection, I respectfully submit to your Honor, is this, that

(Testimony of Charles Lee Horsey, Sr.)

this advertisement that is the subject matter of this suit, was published in Clark County, and came to the attention of the people in this county, I think——

The Court: I think the 1950 returns ought to be admitted. I will admit the 1950 returns, but the 1946 are not admitted.

Mr. Thompson: Inasmuch as Judge Souter made a combination offer, I think it behooves me to object singly to the return for the year 1950 upon the grounds which I stated as to the returns for 1946.

The Court: The record may show that the objection is overruled as to the 1950 returns.

Mr. Souter: I would like now to offer in evidence a copy of an advertisement appearing in the Review-Journal [11] of Las Vegas, Nevada, which it has been admitted was put in the paper by the defendant Nevada Citizens Committee, Southern Nevada Branch. I offer this in evidence.

Mr. Thompson: We don't object.

The Court: It will be admitted, Exhibit three.

Mr. Souter: I would like to offer in evidence the case of the City of Reno, a municipal corporation, petitioner, vs. the Second Judicial District Court of the state of Nevada, in and for the County of Washoe, William McKnight, judge of said court, and Charles Reel, and Alvin Rae, respondents, found at page 416, in Volume 59 of Nevada Reports.

Mr. Thompson: We object to the offer on the ground that the decision therein set forth, is irrele-

(Testimony of Charles Lee Horsey, Sr.)

vant and immaterial to any issue in this case, and it is an offer of a legal opinion, which is proper for instruction by the Court to the jury, if such instruction becomes necessary, and is not proper as evidence in this case.

(Discussion)

The Court: I am going to sustain the objection. It is a matter for the court in its instructions. (Exhibit not in evidence.)

Mr. Souter: Justice Horsey, what court in the United States has the last word on what is the law?

Mr. Thompson: If the Court please, I object [12] to the question on the ground it is irrelevant, immaterial and a matter for instruction by the Court, and it is a question of law.

The Court: The objection will be sustained.

Mr. Souter: In the Supreme Court of Nevada, does the Court on an appeal, hear witnesses?

Mr. Thompson: If the Court please, I make the same objection.

The Court: I would like to know what the purpose of that question is.

Mr. Souter: I wish to show the procedure in that Court in order that the jury, as laymen, may understand what the function of that court is, simply to determine the questions of law that they have nothing to do with the record as made but that they are called upon merely to apply the law to a case that comes before them, to determine whether or not the lower court, in their opinion correctly or incorrectly decided the case.

(Testimony of Charles Lee Horsey, Sr.)

(Discussion)

The Court: Well, we will consider that matter upon instructions, if I think it is necessary later on, but I can't see where it is an issue of fact to go to the Jury right now. Objection will be sustained.

Mr. Souter: In arriving at your view in the White Cross Drug Store case, were you influenced in any way [13] by anything other than what you believed to be the law, which applied to that particular case?

Mr. Thompson: If the Court please, I would like to object to that question, first, on the ground that it is irrelevant and immaterial, it is too general in that it does not confine Judge Horsey's answer to what he consciously did, and I think if he is to testify regarding any influences which were brought to bear upon him with reference to his opinion in that particular case. It should be limited to influences that he knew about and that he was conscious of.

The Court: Objection overruled. You may answer the question.

Mr. Souter: In the determination of the appeal in the White Cross Drug Store case from Las Vegas, were you influenced by anything other than what you believed to be the law, as applied to the legal questions arising in that case?

A. I was not influenced in any respect except trying to do my duty, and to follow my oath of office.

Q. Do you recall a visit on a man named Paul

(Testimony of Charles Lee Horsey, Sr.)

Gardner, before the election of 1950? At Lovelock, Nevada?

A. I recall meeting him and discussing matters with him. [14]

Q. What was Paul Gardner's business, do you know?

A. He had the weekly newspaper, I believe the Review-Miner, of Lovelock, Nevada. That isn't the exact name.

Q. And do you recall about when it was that you made that visit?

A. Well, it was along about the end or nearly that, thereabouts, at Lovelock.

Q. The end of what, Sir?

A. Well, October. During the—I was just starting on my campaign.

Q. That was in 1950? A. Yes.

Q. And you were a candidate for the office of Justice of the Supreme Court, to be voted on on November 5th, 1950, that year?

A. That is right.

Q. Will you please tell the members of this jury, to the best of your recollection, just what the conversation was that you had with Paul Gardner, at that time, in Lovelock?

A. Mr. Gardner started in by something rather startling. He said, 'Are you pro-labor?' referring to me. I said, 'Yes. I have always been for labor,' and [15] then I referred to the fact that I was a state senator, in a political office, and that I did a number of things for labor when I was in the

(Testimony of Charles Lee Horsey, Sr.)

state senate, way back in 1913. A number of matters passed in regard to labor at that time, and I was acting in regard to it. And I mentioned that to Mr. Gardner, but I said, 'As you know, I have been a district judge also, and also a justice of the Supreme Court for the past five years, and that I fully realize my duties,' and that certainly I would not permit it, on the pro-labor feelings that I might personally have, to have the slightest effect, or any effect whatsoever, except as to the law, in regards to my opinion on the White Cross Drug Store case, to which he had referred. He seemed to question some—Mr. Gardner—my prior decision, reconsideration, as to the White Cross Drug Store case, and he couldn't quite understand why there had been a reversal by the majority of the Supreme Court, and permitting pickets to picket back and forth, peaceably, before the White Cross Drug Store, and he was very, very narrow in what he had said about it, and——

Mr. Thompson: I move that his characterization of what Mr. Gardner deemed, be stricken, and the jury be instructed to disregard it.

The Court: That will be stricken. All that he just stated with regard to what Mr. Gardner seemed [16] to think.

Mr. Souter: Mr. Justice Horsey, please limit your recital to the jury, of this conversation, to just what was said by you and by Mr. Gardner, and avoid any characterization of and any statements made by Mr. Gardner.

(Testimony of Charles Lee Horsey, Sr.)

A. Gardner mentioned something about that some of the laboring people might be bad labor racketeers. Well, I said, I don't know anything about that, that is, I haven't come in contact with them, but if they are such as that, I condemn them just as much as you do. I told Gardner at that time, and I pointed out to him, that my decision or my opinion on rehearing, was based upon the decisions of the United States Supreme Court of our own State of Nevada, of the California decisions in regards to picketing, and that I had a very recent opinion that had been presented or that I found in the advance sheets, from the State of Washington, and I mentioned those various decisions in my written opinion on rehearing, pointing out to Mr Gardner that it certainly wasn't a question of my personal views, the overwhelming majority of our courts in regard to peaceable picketing had been upheld, and it behooved me to follow the law. And Gardner I could tell wasn't too pleased and yet I went into great length, probably required a half an hour or so. My son was with me at the time, Charles Lee Horsey, Junior.

Q. Was there anybody else present at the [17] time of this conversation besides you, Gardner, and your son, Charles?

A. There was a printer that seemed to be interested about baseball or football and he dropped in to talk about the game over the radio. He had heard it, and then he was there a little while, and nothing occurred in regard to conversation between

(Testimony of Charles Lee Horsey, Sr.)

Gardner and me, and then he left and went back to his work in a back room.

Q. So that the only persons present during the time of this conversation, were you, your son, and Gardner.

A. Yes. Pardon me, Judge, he did not even mention to me as to whether I had any affiliation with labor racketeers, all he was asking me about was whether I was pro-labor. I said, I have always been for the working man. I was a poor boy, but that that had nothing to do with my judicial opinions, because I even told Gardner that I was under oath, as a Supreme Court Justice, and I certainly was not prejudiced in regards to matters of that sort, because I would be unfit to be there if I was.

Q. Have you ever at any time, on the district bench, or on the supreme bench, permitted your feelings toward labor to influence your legal decisions in any way whatsoever?

A. That is true. I was uninfluenced completely, [18] in that respect. Another thing that happened between Gardner and me, was I tried to make it clear to Gardner about perhaps a new legislative act might occur in the future, known as the right-to-work statute, and I realized that it was being agitated but our court couldn't pass on it, that it was for the legislature. And I told Gardner, I said, if that is an act, and I am a member of the court, I shall certainly give full consideration to it. I told that to Gardner.

Q. Did you, in any way, shape, or form, in that

(Testimony of Charles Lee Horsey, Sr.)

conversation, ever indicate by any words of yours to Gardner, that you were in favor of labor racketeers?

Mr. Thompson: I object to that question, your Honor, on the ground it calls for the conclusion of this witness, and to what somebody else understands, and what he said. He has already stated what he said.

Court: Well, the objection will be sustained. This witness' testimony at this time should be confined to what actually was said by those present. That's a summation or giving us what the effect of the conversation might be. We are not looking for that here now. It is merely to see what was done and said at that meeting with Mr. Gardner, and that question is certainly outside the purview of that function.

Mr. Souter: I asked the witness, if I may respectfully report to the Court, whether or not he, at any [19] time, said he was in favor of labor racketeers, which is made a part of this advertisement.

(Question asked and witness permitted by Court to answer same.)

Mr. Thompson: Well, I make the same objection to that question, your Honor, and also the further objection that it is leading, because Judge Horsey has testified at length as to what was actually said. It is for the members of the Jury to draw their own conclusions as to what he said and Mr. Gardner

(Testimony of Charles Lee Horsey, Sr.)

repied, and it is for Mr. Gardner to draw his own conclusions.

Court: You may answer that question.

Mr. Souter: Q. Did you ever say to Paul Gardner that you were in favor of labor racketeers?

A. I certainly didn't. I condemned any reference that he made to that, that that shouldn't be tolerated, or words to that effect.

Q. I show you this advertisement that has been offered in evidence and marked Plaintiff's Exhibit 3 and I ask you whether you know how many days before election that advertisement was published?

A. I learned after I had left Las Vegas——

Mr. Thompson: Well, if the Court please, to save time, we will stipulate it was published on the fifth of November, 1950, and that the election was on November [20] the seventh, 1950.

Mr. Souter: Very well, thank you, Mr. Thompson.

Court: I wonder if the Jury understands that stipulation? Would you read that, please?

(Stipulation read to Jury)

Mr. Souter: Before the publication of the advertisement which has been received in evidence as Plaintiff's Exhibit 3, did any of the Defendants, or anybody representing them, or anybody from the Nevada Citizens Committee, or anybody from the Review-Journal, the paper published by the publishing company which is a defendant in this action, or Mr. Cahlan, call you up, or get in touch with you in any way, shape or form, to check with

(Testimony of Charles Lee Horsey, Sr.)

you as to the truth of the conference with Mr. Paul Gardner?

A. They did not. The first time I saw that article was two days after election.

Mr. Thompson: I object——

The Court: The question has been answered. The latter portion may go out as not responsive.

Mr. Souter: When did you first see that advertisement?

A. I think it was Thursday, following the election of Tuesday. That would have been the eighth of November that I received it, through the mail.

Q. Did the publication of the advertisement, which has been marked Plaintiff's Exhibit 3, published in the Review-Journal, on behalf of the Nevada Citizens Committee, have any effect upon you personally? Yes or no.

A. It certainly did, yes.

Q. Will you tell the Court and Jury what effect the publication of that advertisement had upon you.

Mr. Thompson: I object to the question, principally its form, your Honor, because the purpose is to try to have this witness testify to the effect that certain reactions of his were caused by the publication, and actually, if he is going to testify he should testify to—as to how he felt after he read the publication, without any effort to testify as to the cause of why he felt that way.

The Court: Isn't that a rather narrow distinction? The effect and how he felt?

(Discussion)

(Testimony of Charles Lee Horsey, Sr.)

The Court: The objection has been overruled. You may answer the question.

Mr. Souter: The Court has overruled the objection and you may now tell the Jury what the effects were.

A. I was right in the midst of my duties on the Court, which continued on for two months after the election, until the first of January following, and I was very busy [22] on the Court. I had to preside nearly every day or every couple of days, as the cases came, and the arguments were had. And I had to preside there during all that time, and I had little time except at night to commence to realize the enormity of this, and the effect that it was having on me. As to all the time that I could give to it then, and after the term expired. I had no money, and I undertook to sell my home there in Carson, and it took several months before I came down here. I had much more time. I commenced to realize the enormity of the injury, and it got so that I certainly couldn't talk to everybody that I would meet in regards to the situation, I had carried Carson City and Ormsby County where I lived, the last time, but the first time I never carried it. But the last time I got a substantial majority. And one of the first things that occurred to me was that I would be walking around the streets——

Mr. Thompson: I object to that as a voluntary statement. Not responsive to the question, your Honor.

The Court: So far we have not had any answer

(Testimony of Charles Lee Horsey, Sr.)

to the question, what was the effect. We have had a reason, he didn't realize it for a period of time, but——

Mr. Souter: The Court has suggested that you get right down to the effect that this has had.

A. That is what I am attempting to do. It can't just be done by a conclusion. I have to explain a little [23] bit in regards to what occurred in my mind.

Mr. Souter: All right. Well, get to the meat of it as quickly as you can, please.

A. Well, one of the first things is when I was attempting to walk up and down the streets of Carson and they didn't know me because I thought the people of Clark County knew me, and it was Clark County that the article occurred in, and I commenced to think what effect that would have, must have had, where they knew me so well, that I must have been considered more or less a criminal or something because of their accusations, over and over again, plainly implying and strongly indicating that I was in association with labor racketeers. And when I would meet people in Carson, going along, I would hate to stop and talk with them, because it looked as though that they would have some suspicions as to my honor, and integrity, and that was repeated more and more as time went on, until I got so I didn't want to meet people, but I would take walks at night, and most of the time, even while I was still on the Court, I would think so much at night in regards to these articles, I mean

(Testimony of Charles Lee Horsey, Sr.)

these statements, and by the way, I understood there were fourteen thousand that were distributed only two days before election——

Mr. Thompson: I move that that be stricken as not responsive. [24]

The Court: That part will go out, about the distribution.

A. Pardon me. And of course, even though I had to be on the Court, there were times I couldn't sleep at all, but would have to go down and do my duty on the Court and preside the next day. But after that it was worse.

Mr. Souter: Now, then, you came down to Las Vegas, to endeavor to start the practice of law again?

A. Yes, I did. And in Carson I thought——

Q. No. I mean in Las Vegas.

A. I know, but just a minute, please, Mr. Souter, at Carson I had thought a little bit about undertaking to practice law there, and then it occurred to me, why, I am not known there, not nearly as well as Las Vegas, and I had better undertake to practice down in Clark County. It turned out to be a mirage. When I got down here and realized the enormity of the injury, and the hundreds and thousands of people that had come in that I didn't know, I realized that it would take all my time and more than my time to try to meet people and disabuse their minds as to my honor and my integrity, and how could I practice law under those conditions? When the expenses of practicing law

(Testimony of Charles Lee Horsey, Sr.)

had greatly increased, and there were about seventy attorneys in Clark County, and I would have to start all over again, and give my whole attention to trying to disabuse and trying to [25] overcome the injury I had received.

Cross Examination

By Bruce R. Thompson:

Mr. Thompson: Q. Judge Horsey, during your lifetime, what elections have you lost?

A. During the years?

Q. Uh huh.

A. Oh, well, I ran for Congress in 1928. I was a Democratic nominee, but there were nearly all Republicans, Herbert Hoover, and so on, elected at that time. I was highest on the Democratic ticket for Congress except the Honorable Key Pittman, who had been United States Senator for years, and all the others on the State ticket received less than I did.

Q. Is that the only one?

A. Oh, no, there were other campaigns. Way back in 1910, when I undertook to run for district judge, when I was 28 or 29 years old, 30, and then Judge Brown retired and went to Reno to practice, and Elko County was coupled then with Lincoln and Clark counties, and I ran for district judge, but the large population then wasn't down here, it was at Elko county, and Judge Taber, who was my associate later on at the—on the Supreme Court—we were always friendly— [26] won at the time.

(Testimony of Charles Lee Horsey, Sr.)

Well, the result was that Taber defeated me with about five hundred majority. The large vote from Elko county was responsible. I carried Lincoln county then.

Q. Were there any other elections that you lost?

A. Oh, yes. In 1940.

Q. Which one was that?

A. As district judge, but——

Q. Was that in Clark county?

A. But that was at the primary.

Q. That was in Clark county.

A. That was at the primary.

Q. In Clark county, Nevada?

A. Well, it was Clark and Lincoln, then.

Q. Clark and Lincoln counties, yes.

A. Yes.

Q. And then the last election you lost was from, was in November of 1950, when you ran against Judge Merrill, or he ran against you, for the Supreme Court?

A. I felt, in regards to 1950, if it hadn't been for that article——

Q. Well, I say, that's the last one you lost, wasn't it?

A. Yes. And I don't believe I lost that, [27] legitimately.

Q. Now, when you first went on the Supreme Court of Nevada, you were appointed, were you not, in 1945?

A. '45. Yes. And then I had to run in '46.

Q. At the next general election?

(Testimony of Charles Lee Horsey, Sr.)

A. And ran against Mr. Mathews, and I won.

Q. Now, in 1945, when you decided to accept the appointment as Justice of——

A. Well, I was appointed as district judge first down here, and I was down here for about three months, on that court, when I was petitioned again.

Q. All right, wait a minute, you remember when you were appointed to the Supreme Court, in 1945, do you not?

A. Well, it was about the 10th of October.

Q. 1945? A. Yes.

Q. And at that time you decided to accept the appointment, which was offered to you, did you not?

A. I did, after a considerable, I had—there had been a petition around——

Q. Well, you decided to accept it, didn't you?

A. Well, I knew about that——

Q. Well, did you accept the appointment?

A. I did, eventually, yes. [28]

Q. And when you accepted the appointment, you knew that you were going to have to close your law office, didn't you?

A. At that time? Yes.

Q. And when you accepted the appointment, you knew that you were going to have to abandon whatever law practice you had at that time?

A. I thought that I would.

Q. Yes. And you also knew that in the Fall of 1946 you would have to run for re-election for the balance of four years, the remainder of that term of office? A. Yes.

(Testimony of Charles Lee Horsey, Sr.)

Q. When you accepted the appointment you knew that you had those things in front of you, didn't you? A. Yes.

Q. And you also knew that you might be defeated in that 1946 election? A. Oh, yes.

Q. But when you decided to run in 1946 you knew that if you were elected to the Supreme Bench for four years, you would be away from Clark County, and away from your former associates, for that period of time, did you not?

A. Yes.

Q. You knew that?

A. I fully thought that I would continue on my [29] duty on the Supreme Court.

Q. And you knew that you would have to run again in 1950, didn't you?

A. 1950? Well, I didn't know that.

Q. Well, you knew that somebody could file against you if they wanted to.

A. Yes. It turned out that way.

Q. And that there was a possibility?

A. Very seldom on the Supreme Court have the justices had to campaign, and one right after the other—so close together—

Q. And you knew of the possibility that you might have to return to Las Vegas to resume your law practice? A. Sir?

Q. You knew of the possibility that you might have to return to Las Vegas to, or at that time in Carson, or go to Reno or some place else, to re-

(Testimony of Charles Lee Horsey, Sr.)

sume your law practice in the event you were defeated?

A. Well, after Mr. Merrill decided to oppose me, why then I felt duty-bound—I had only served a part of a term—and I had the right, of course, to continue on the bench, and I liked the work on the Court, and I thought I had been successful.

Q. There has been received in evidence, Judge [30] Horsey, the decision of the Supreme Court in the case of the culinary workers against the court. You are familiar with that decision?

A. Well, is that the White Cross drug store?

Q. Yes. The White Cross drug store case.

A. Yes.

Q. And is it not true that that case got to the Supreme Court of Nevada by appeal from a judgment of the district court of Clark county?

A. Yes, sir.

Q. And is it not true that Judge Henderson, who was then the judge of the district court of Clark county, did not agree with you as to the decision in that case?

A. Well, he prohibited picketing. He forbade—he stopped the picketing at the White Cross drug store.

Q. That was the effect of Judge Henderson's decision?

A. That was Judge Henderson's decision, and then it was appealed to the Supreme Court.

Q. And the effect of the opinion of the Supreme Court, concurred in by you and Judge Eather, was

(Testimony of Charles Lee Horsey, Sr.)

to say that the picketing was lawful, and it didn't have to be stopped, is that correct?

A. Following it—that was done largely upon the basis of a tremendous amount of authorities that we looked [31] up.

Q. Now, Judge Badt of the Supreme Court, Judge Milton Badt, disagreed with you and Judge Eather, did he not?

A. Right then, but as I understand, since then Judge Merrill has virtually indicated that if my decision had gone up to the United States Supreme Court it would have been upheld, and after great research, why, Judge Badt has said that he decided to concur with Judge Merrill, because Judge Merrill has indulged in great research in regard to it, and so in a measure, he changed his opinion. Badt did.

Q. I move that the answer be stricken as not responsive. A. And he concurred with it.

The Court: The latter part, as to why he thinks Judge Merrill, or Judge Badt, did something, may go out as not responsive, and may be stricken.

Q. I will repeat the question. In the decision of the White Cross Drug case, in the Supreme Court, didn't Judge Milton Badt of the Supreme Court, disagree with you and Judge Eather?

A. Yes. It was a majority decision, of Judge Eather and me.

Q. And Judge Milton Badt of the Supreme Court agreed with Judge Henderson of the local district court? [32]

(Testimony of Charles Lee Horsey, Sr.)

A. At that point, yes. But you should bear in mind that his later action——

Q. Well,—now, with reference to Plaintiff's Exhibit 3, the advertisement which was published in the Las Vegas Review-Journal, of November 5, 1950, you are familiar with that, are you not, Judge Horsey?

A. Oh, I haven't read it recently, but I know what——

Q. Well, you know that that ad contains, as a part of it, a reprint of an editorial by Mr. Paul Gardner, which he printed in his Lovelock paper?

A. Yes, and that was, I learned it was greatly embellished, and a full page, and all that, later, here, two days before election and I had no chance to even answer it.

Q. Now, as shown by this ad, that editorial was printed in the Lovelock Review-Miner, on October 26, 1950, was it not?

A. Yes, but I was making my campaign. I glanced at some of those papers, I think, in town, but I am not sure that the Lovelock Miner or Review-Miner, was one of them or not. I noticed some Elko papers and the Fallon paper, and I glanced, perhaps—as to the Review-Miner—if I got a hold of it. But I didn't seriously ponder it because it wasn't any full-page ad, and it was a small paper.

Q. You did see that editorial, did you not?

A. Well, it could have been that I glanced at it, but I had had a hard day. I had been all the way from Ely, campaigning at Eureka and Austin.

(Testimony of Charles Lee Horsey, Sr.)

And finally, in the evening, my son and I arrived at Fallon, and it was maybe nine o'clock that night when we walked down the street and picked up some newspapers.

Q. Well, Judge Horsey, what did you do about that editorial after you read it?

A. Well, I did nothing. I was right in the midst of my campaign. I didn't consider—if I read it fully, I didn't consider it was—I thought it was reprehensible. It wasn't in accord with what he and I had discussed, if it was from Gardner.

Q. During the latter part of your service on the Supreme Court didn't you suffer some unfortunate accidents and illnesses? A. What's that?

Q. Didn't you have some unfortunate accidents?

Mr. Souter: If the Court please, I object. I can't see any relevancy——

The Court: I can't either.

(Discussion)

The Court: Will counsel approach the [34] bench, please?

(Counsel approach bench)

Court: The objection will be sustained.

Mr. Thompson: Q. Now, when you first saw Mr. Gardner in Lovelock in his newspaper office about the tenth of October, Mr. Gardner asked you whether you were pro-labor? A. Yes.

Q. And you answered, did you not, in effect "I admit I am"? A. Yes.

Q. And then you went on to explain what you

(Testimony of Charles Lee Horsey, Sr.)

meant by your answer, is that right? I mean, you have told us what you said.

A. I explained not only in regards to the decisions that I had looked up, and at that time I had written—I mean, referred—to them, the California and the state of Washington, and the United States Supreme Court decisions, and our own State.

Q. All right, now, will you tell the jury what you told Mr. Gardner about your being two persons?

A. About what?

Q. About your being two persons.

A. Two persons? Yes, I brought that out to Mr. Gardner. In the last trial my son fully explained that. [35] He was there, and he mentioned it, I think, at the last trial, that I had tried to make it plain to Mr. Gardner that I was like two persons, that as a political officer, when it was my duty to help formulate legislation, that I had been strongly for certain labor legislation, and then I said to him, 'when it comes to the judgeship I am like two persons. I told you I was pro-labor, personally. Individually. But I am altogether a different person, when it comes to performing my duties on the Supreme Court, as I had been and felt, when I was a district judge, because I was under an oath of office. I couldn't be prejudiced in favor of either side, or either interest'.

The Court: We will take a short recess now.

(Recess taken at 3:10 to 3:20 p.m.)

Q. Judge Horsey, what effect did the fact that

(Testimony of Charles Lee Horsey, Sr.)

you lost the election to Judge Merrill, have on your personal situation? And your personal feelings?

A. It wasn't—the two were combined. The drastic, the severe effect was the article, the Las Vegas Review-Journal article, and the Lovelock paper article, because that was an assailment of my honor, and my integrity. And I never had had that experience before.

Q. Well, what effect did the loss of the election have? [36]

A. The two were coupled together, and I don't believe I was defeated, because fourteen thousand copies were circulated at the last minute, there were thousands of new people in Southern Nevada, and it was, I think at the last trial, it was pointed out by Judge Souter, that there were seven or eight different times that labor racketeers was associated with my name, in that article.

Q. Well, referring to the last trial, you testified at the last trial, did you not? A. Yes.

Q. And you testified as a witness, didn't you, just as you are testifying now?

A. Well, it was the substance of it, and my great injury, that I felt.

Q. What did you say at the last trial about the effect of the loss of the election upon you?

A. Well, I said that, in substance, that I was broken in health, at least that my spirit had been broken. And my health had been injured and my mental faculties had been greatly injured because of the worry and the fact that I had no opportunity

(Testimony of Charles Lee Horsey, Sr.)

to counter-act the viscious effect of those statements, and if you figure them up, there would be about a hundred thousand times, considering the fourteen thousand copies of that article, in which I was without chance of reply, and I had been in a pretty high position. [37]

Q. Well, Judge Horsey, as I understand, you didn't, from your direct testimony, you really didn't feel the enormity of the situation, as you term it, until, say the Spring of 1951. Is that true?

A. Oh, I felt it all the way along, after the election, but of course, I was very busy there on the Court, and I was proud enough that I kept on, day after day, for two months after that.

Q. Is it not true that you did not file this suit against the Southwestern Publishing Company and the Citizens Committee, and Mr. Cahlan, until July of 1952?

Mr. Souter: I object, if the Court please, on the ground it is entirely immaterial.

The Court: The objection is overruled. You may answer the question.

(Question read)

A. I had been discussing that with my attorneys numerous times before.

Q. I would like to ask, is it not true that the suit was not filed until July of 1952?

A. Yes. June or July. July the 22d, I think.

Q. Of 1952? A. Yes.

Q. Judge Horsey, with reference to your [38] statement that you took walks at night, hasn't it

(Testimony of Charles Lee Horsey, Sr.)

been your practice throughout most of your life, to take walks at night?

A. Oh, yes, but I was glad to meet people in the daytime too.

Q. But you—hasn't it been your habit, throughout most of your life, to take walks at night?

A. Because——

Q. Well, has it or hasn't it?

A. Well, I was forced to it, because I was busy all day long in court, for two months after the election.

Q. That's all, your Honor.

CHARLES LEE HORSEY, JR.

having been first duly sworn, took the stand and testified as follows:

Direct Examination

By Clyde D. Souter:

Mr. Souter: Q. Will you state your name, please? A. Charles Lee Horsey, Jr.

Q. Where do you reside?

A. Las Vegas, Nevada. [39]

Q. How long have you lived in Las Vegas?

A. Well, we moved to Las Vegas in 1922. I was away to school for some time. I worked in Los Angeles for a number of years, and I came back to Las Vegas to live in 1941, and have lived here continuously since that time.

Q. Are you in business here? A. I am.

Q. What business? A. General insurance.

(Testimony of Charles Lee Horsey, Jr.)

Q. During the election trip for the election of 1950, did you accompany your father on that trip?

A. I did.

Q. And your father is Charles Lee Horsey, Sr.?

A. He is.

Q. Do you recall calling on a man named Paul K. Gardner, up in Locelock, the publisher of the weekly up there called the Lovelock Review-Miner?

A. I do.

Q. And who was present during your call there?

A. Mr. Gardner, my father, and myself.

Q. What about this man that came in about the football scores, did he stay there for any length of time? [40]

A. No, he was working there in the print shop, and he just came out and announced some score, and went back to his work.

Q. And will you please tell this jury just what conversation took place between your father and Paul K. Gardner, during that time, as closely as you can remember the conversation, tell it to the jury.

A. We walked into Mr. Gardner's office and my father greeted him first, and then he introduced me to Mr. Gardner, and I mentioned that I had had the pleasure of meeting Mr. Gardner previously. Mr. Gardner asked us to be seated. My father was seated on Mr. Gardner's right and I was seated across the desk from the two of them. Mr. Gardner turned to my father and said, 'I understand you are pro-labor?' My father smiled a little bit and said,

(Testimony of Charles Lee Horsey, Jr.)

'I admit I am.' And then he said, 'Now I will proceed to tell you what I mean by that.' And then he went into a long conversation, great details as he always has done with every speech he writes, went back to his early childhood, as a matter of fact, and talked about his struggles getting through school, moving from the city back to his old home town in Delaware, to get through high school, and then taking a few years out working, in order to accumulate some money to go to the university to study law, and finally getting through law school, getting to Pioche, and then more detail about what [41] transpired the time we were in Pioche and in full, about the office he held in Lincoln county, then down to Clark county, same thing all over again. And then on up to Carson City, and on to the Supreme Court. Explained to Mr. Gardner in minute detail that he had been in the public eye all his life, practically, since he had been in Nevada. How he had been a legislator, a district attorney, a prosecuting attorney, a defense attorney, district judge, and supreme court judge. How he had had to be one person at one time and another person at another time. Then he went into more detail about the particular case in which Mr. Gardner was interested and that was the White Cross Drug case. He explained to him that the court, he and Judge Eather, had followed the precedent set by the Nevada Supreme Court, who was on the Court at the time the decisions were rendered. Went into a recitation of the different Supreme Courts of the other

(Testimony of Charles Lee Horsey, Jr.)

states, and the Supreme Court of the United States, and tried to point out to Mr. Gardner that if the people of Nevada were not satisfied with the law as it related to labor and picketing, that the remedy lay with the legislature. That there had been considerable talk about a right-to-work bill being enacted, and if that did transpire and then a case came up before the Court, then it would present an entirely different problem. He would have to give that the same duty and put in the same work on that as he had done on all other cases that came before him. Mr. Gardner sat there listening. I don't know exactly how [42] long we were there, but I was a little tired when we got there, and I thought that, well, we are starting out on the campaign and if every stop we make takes as long as this we will never get around the state in the short length of time that we have. After my father finally finished, Mr. Gardner stated that in his opinion labor had become too powerful. Mentioned the fact that labor unions were dominated by labor racketeers and that his own employees, his own printers there were making more money than he and his wife were making, and that they were both college graduates. I think that just about covers—there were a few other things that transpired, but—my father mentioned to Mr. Gardner that, just before we departed, that he would not be able to advertise too extensively and spend as much money in this campaign as he had done previously, and that he had had to cut Mr. Gardner's ad down as well as other news-

(Testimony of Charles Lee Horsey, Jr.)

papers, throughout the state. And then I think my father expressed a desire to see an attorney there in Lovelock, I believe his name was Mr. Young, and Mr. Gardner finally did locate him on the telephone, and after that we bade Mr. Gardner good bye and left.

Q. This paper in which the editorial appeared, according to Exhibit 3 in this case, was published on October 26, 1950. Did you and your father run across that paper during the campaign or after election day? [43]

A. It was after election insofar as I was concerned. We left Lovelock, I believe, the day after we were in Gardner's office, and never did return to that county. And I did not see that article until after election. I saw the article in the Review-Journal the day of election.

Q. Your father returned to Carson City after his term as Justice of the Supreme Court expired, did he not? Or came to Las Vegas, I mean?

A. Yes. Several months afterwards, yes, sir.

Q. Do you know whether he attempted to engage in the practice of law? A. Yes, he did.

Q. Where?

A. In my suite of offices in Las Vegas, 215 Bridger.

Q. Did he get furniture and so forth?

A. Yes.

Q. And did you have an opportunity to observe your father during that period? A. I did.

Q. And was he able to continue to practice law?

(Testimony of Charles Lee Horsey, Jr.)

A. He came down to the office, I'll put it that way, late in the morning. Did something he had never [44] done before, to my knowledge, when he started going home early in the afternoons.

Q. Did you have an opportunity to observe what his mental reaction was, to the publication of this advertisement in the Review-Journal, that is marked Plaintiff's Exhibit 3? A. I did.

Q. What was that reaction, as you reviewed it?

Mr. Wiener: We would like to object to the witness answering the question as to what the mental reaction of Judge Horsey was, to a particular situation, as it was.

The Court: I think you can just leave out the main word "mental" there,—if he noticed any reaction.

A. The body was there, the heart and spirit wasn't.

Mr. Wiener: Your Honor, I would like to move to strike——

The Court: It may stand.

Mr. Souter: You may cross examine.

Cross Examination

By Louis Wiener, Jr. [45]

Mr. Wiener: Q. Mr. Horsey, you testified that after your father returned from Carson City, Nevada, to Las Vegas, in 1951, he didn't come down to the office until late in the morning, or early in the afternoon?

A. Late in the morning, I said.

(Testimony of Charles Lee Horsey, Jr.)

Q. As a matter of fact, Mr. Horsey, wasn't that your father's practice, during the many years that he practiced in Las Vegas, Nevada, prior to going to the Supreme Court, to come to the office late in the morning? A. It was.

Q. And there wasn't anything different in that practice after he returned, prior to his going to Carson City?

A. Except the part, leaving in the afternoons.

Q. But as far as coming to the office——

A. As far as coming to the office late in the mornings, no. No different.

Q. Now, I believe you testified, on the prior hearing, you testified did you not on the prior hearing? A. I did.

Q. Now, isn't it a fact, Mr. Horsey, that when Mr. Gardner stated to your father and in Mr. Gardner's office in Lovelock, that "I understand you are pro-labor" that your father said "I admit I am"—is that correct?

A. I think I just testified a few minutes ago [46] to that.

Mr. Wiener: That's all, Mr. Horsey.

(Witness excused.)

Mr. Souter: The Plaintiff rests, Sir.

(Recess taken of ten minutes.)

Mr. Thompson: We are ready to proceed, Sir.

The Court: Do you desire to make an opening statement first?

Mr. Thompson: No, your Honor. Well, I would

like to make a two-sentence statement, your Honor, so that the jury will understand this situation.

The Court: Very well.

(Opening statement made by defense counsel.)

Mr. Thompson: We would like, your Honor, to offer in evidence the deposition of Paul K. Gardner, the owner and publisher of the Lovelock Review-Miner, and I believe the clerk has the original of that deposition on file and we ask that it now be opened and published and we will handle the matter in any manner your Honor desires.

The Court: One of you will take the stand.

(Counsel Thompson takes witness chair.)

Mr. Wiener: Your Honor, for the purpose of the record at this time Mr. Thompson will read [47] the answers of Mr. Gardner to the questions propounded in the deposition by Mr. Rudiak, and I will read the questions which were propounded by Mr. Rudiak, and I will also note the objections that were made.

(Deposition quotation.)

DEPOSITION OF PAUL K. GARDNER

having been duly sworn, testified at Reno, Nevada, Friday, September 5th, 1952, as follows:

(Examination by Mr. Rudiak)

Mr. Wiener: Q. Will you please state your name for the record?

Mr. Thompson: A. My business name is Paul K. Gardner. G-a-r-d-n-e-r.

Q. Is that your true name?

(Deposition of Paul K. Gardner.)

A. That is my true name.

Q. What is your age, Mr. Gardner?

A. It is almost sixty—I am fifty-nine; I will be sixty in November.

Q. And where do you reside?

A. In Lovelock, Nevada.

Q. And how long have you resided in Lovelock, [48] Nevada? A. Over twenty-one years.

Q. Are you a married man? A. I am.

Q. What is your wife's name?

A. Ariel M. Gardner.

Q. And she, of course, also resides with you at Lovelock, Nevada? A. She does.

Q. What is your business, profession or occupation?

A. My business is publisher of the publication known as the Lovelock Review-Miner, editor and part-time printer.

Q. How long have you been engaged in that business? A. Twenty-one years.

Q. Is the Lovelock Review-Miner owned by you in your individual capacity, or is it a partnership or a corporation?

A. The publication is owned by Mrs. Gardner and me.

Q. As a family partnership?

A. We each have an undivided one-half interest.

Q. Who were the owners of the Lovelock Review-Miner during the month of October, 1950?

A. I was the sole owner.

Q. Then it was sometime since October, 1950,

(Deposition of Paul K. Gardner.)

that Mrs. Gardner acquired an undivided one-half interest in the business?

A. That is so, yes.

Q. And was that change in ownership evidenced by any instrument in writing?

A. It is a matter of record in the Pershing County Recorder's office.

Q. Could you tell us what form that conveyance or transfer took?

A. As I remember it, it was a deed. I think it was a deed drawn up by attorney Llewellyn Young of Lovelock.

Q. And that deeded the real estate upon which the place of business, that is, the Lovelock Review-Miner, is situated, to your wife, as to an undivided one-half interest; is that correct?

A. No. Mrs. Gardner or I, or either of us, have owned said real estate.

Q. And did that also transfer to her an undivided one-half interest in all the furniture, fixtures and equipment of your business? [50]

A. Yes.

Q. And approximately when did this transfer take place?

A. I would say a little over a year ago.

Q. Then until a little over a year ago you were at all times from the time that you first acquired this business the sole owner thereof.

A. That is true.

Q. Now, during October of 1950, on what day or days of the week was the Lovelock Review-

(Deposition of Paul K. Gardner.)

Miner published? A. On Thursdays.

Q. That is, it was a weekly publication?

A. That is right.

Q. And had it always been such from the time that you first commenced to operate it?

A. It had.

Q. And is it a weekly newspaper at the present time? A. It is.

Q. During the year 1950 in what parts of the State of Nevada did the Lovelock Review-Miner circulate?

A. The paper largely circulates in Lovelock and Pershing County. We have a few isolated copies go out to various towns.

Q. Is that mainly for purposes of maintaining [51] an exchange service with other newspapers?

A. Largely exchange, yes.

Q. During 1950 did you have any appreciable circulation in Clark County, Nevada?

A. I think we had one copy to go in there if I am not mistaken.

Q. Do you know to whom that copy was sent?

A. I am not the circulation manager. Therefore, I could not say exactly. We exchange with the Sun, but no other papers there. We may have one going to L. O. Hawkins, the former Judge.

Q. According to my recollection the Morning Sun was not in existence in 1950. Did you at that time maintain an exchange service with any other newspaper in Clark County, Nevada?

(Deposition of Paul K. Gardner.)

A. At one time we had one with that old gentleman—was that the Las Vegas Age?

Q. Would that be Mr. Charles Squires?

A. Yes.

Q. So far as you know during 1950 did you maintain an exchange service with the Las Vegas Review-Journal? A. No.

Q. Now, during the month of October, 1950, what was the approximate circulation of the Lovelock Review-Miner [52] in Pershing County, Nevada?

A. I would say between five and six hundred.

Q. And what was the total circulation of the Lovelock Review-Miner?

A. About eight hundred.

Q. And were the other three hundred copies sent to other portions of the State of Nevada?

A. All over the United States.

Q. Did you have an exclusively paid circulation, or was part of it a free circulation?

A. The free circulation consists of advertising companies and exchange papers only.

Q. Then all the rest of the circulation was a paid circulation? A. That is right.

Q. And about how much of that circulation was delivered by mail? A. All of it.

Q. You had no carrier service?

A. Now, wait a minute, the news-stand at that time I think was selling seventy papers in town.

Q. Aside from those seventy papers the rest were all delivered by mail?

(Deposition of Paul K. Gardner.)

A. Yes, and sales over the counter.

Q. During 1950 what was the approximate [53] population of Pershing County, if you know?

A. The 1950 census gave it at sixteen hundred and something—Pershing County or Lovelock?

Q. Pershing County.

A. It gave it as over three thousand.

Q. And did the 1950 census then show the population of Lovelock to be approximately sixteen hundred? A. Over sixteen hundred.

Q. Now, I understood you to say that in addition to publishing and editing the Lovelock Review-Miner during 1950, you were also engaged in the job printing business? A. That is true.

Q. Where was your printing shop maintained?

A. In connection with the publication.

Q. And at that time you were the owner of the property, I believe you testified?

A. True.

Q. Did you originally organize the Lovelock Review-Miner, or did you purchase it as a going concern from some other company?

A. I purchased one-half interest from W. C. Black in January of 1931. A year later I purchased the other half from my partner, a Mr. Morrison.

Q. At what location was your business carried on? [54]

A. We call it 1004 Cornell Avenue.

Q. That is in what city?

A. Lovelock, Nevada.

(Deposition of Paul K. Gardner.)

Q. During 1950 how many employees did you have on the Lovelock Review-Miner?

A. I had a foreman and apprentice in the back shop, and a part-time reporter.

Q. Did this same staff also do your job printing? A. That is true.

Q. And you personally worked in this business, of course?

A. Of commercial printing, yes.

Q. Did your wife participate with you in the management and operation of the business?

A. She is the Business Manager.

Q. And she daily devoted her time to the operation of the business? A. That is true.

Q. How many of your employees during the year 1950 were members of any labor organization?

A. My foreman is an outstanding member of the International Typographical Union, being a delegate to the national convention, and was fully paid up at that time. The apprentice was not eligible because he was just learning [55] the business.

Q. Will you please give us the name of your foreman?

A. Lloyd—I think his middle initial is C., I am not sure—Newton.

Q. Is he still employed by you at the present time? A. He is.

Q. Could you give us his address, please?

A. It is on Franklin Avenue, Lovelock, Nevada.

Q. And what was the name of the apprentice?

A. I have forgotten. He had a Hungarian name.

(Deposition of Paul K. Gardner.)

Q. Your payroll records, of course, would show his name? A. They would.

Q. Do you have them with you here today?

A. No, I don't.

Q. Would you have any objection to obtaining his name and address and forwarding it to the reporter to become a part of your answer to the preceding question?

A. He is now somewhere in the Army, but I have no objection to trying to find his address.

Q. Will you please get us his name and address [56] if you are able to find it? A. I will.

(Reporter's Note: In answer to the question propounded on line 26, page 11, I am in receipt of a letter from Mr. Paul K. Gardner dated September 10, 1952, which is quoted below and is self-explanatory.)

September 10, 1952

Mr. Marvin M. Wilhoit,
Official Reporter, District Court, Reno, Nevada
Dear Mr. Wilhoit

Regarding information desired for the record:

Donald Chunat, who worked for us as an apprentice from June 3, 1950 to November 28, 1951. He is now in the armed services and we do not know his address. His parents live in the small town of Wauzeka, Wisconsin. He was 18 years old when he came to work for us.

Francis Lynne Peters, known to us as "Lynne Peters," came through here with his family about six months ago. He said he was going to the vet-

(Deposition of Paul K. Gardner.)

erans hospital at Boise, Idaho for an operation. We have not heard from him since and so far as we know no one in town has heard from him. So we don't know where he is. His native home was Sco-bey, Montana, a small town, where he could find only part time work when we employed him in July, 1938.

A copy of this letter is being sent to the law firm of Ralli, [57] Rudiak & Horsey in Las Vegas.

Yours very truly,

/s/ Paul K. Gardner

Paul K. Gardner, Publisher

Q. Would you please give us the name of your part-time reporter who was employed by you?

A. Mrs. Florence Young.

Q. Is she still employed by you?

A. She is.

Q. And what is her address?

A. Dartmouth Avenue, Lovelock, Nevada.

Q. Do you at present employ additional employees? A. No.

Q. Then I take it from your previous answers that the only member of the labor organization who was employed by you during 1950 was Mr. Lloyd Newton? A. And the apprentice.

Q. Was the apprentice also a member of a labor organization? A. No.

Q. Prior to the month of October, 1950, had any representative of a labor organization ever attempted to or actually organize your employees?

A. No. [58]

(Deposition of Paul K. Gardner.)

Q. Prior to the month of October, 1950, had any representative of a labor organization ever attempted to or actually organize your employees?

A. No.

Q. Prior to October 26, 1950, have any labor organization made demands upon you to enter into a collective bargaining agreement? A. No.

Q. Did you during 1950 have a collective bargaining agreement with the International Typographical Union? A. No.

Q. Did you pay your foreman, Mr. Lloyd C. Newton, the union scale of wages for his type of employment? A. Yes.

Q. And what was that scale during 1950?

A. \$100.00 a week for forty-four hours, and time-and-a-half for overtime.

Q. Are you at the present time a party to any collective bargaining agreement with any labor organization? A. No.

Q. Prior to the month of October, 1950, had any labor organization made demands upon you for union recognition? [59] A. No.

Q. Prior to the month of October, 1950, had any labor organization made demands upon you for a closed-shop or a union shop? A. No.

Q. Prior to the month of October, 1950, had any labor organization made demands upon you relative to wages, hours or working conditions?

A. No.

Q. Have you ever been involved in a labor dispute with your employees? A. No.

(Deposition of Paul K. Gardner.)

Q. Has your business ever been involved in a strike? A. No.

Q. In a lock-out? A. No. [60]

Q. In a boycott maintained by labor organizations? A. No.

Q. Have you ever been denied the use of a union label?

A. Not being large enough to be a union shop, we cannot have a union label.

Q. Then you do not now have a union label?

A. We do not.

Q. Then if I understand your answers correctly, although you paid the union scale of wages to your foreman, you did not maintain a union shop as that term is generally understood?

A. We do not.

Q. Did you also pay your apprentice the union scale for apprentices? A. I do not know.

Q. What was his rate of compensation during 1950? A. I believe it was \$42.00 a week.

Q. For how many hours? A. Forty-four.

Q. You state that you believe that was it, Mr. Gardner. You are not positive that that was the amount you paid him? [61]

A. Just when we started paying him, for a short while we paid him \$36.00; then we jumped him to \$42.00. I don't know when that was.

Q. How long was he with you in all?

A. He came to stay six months and stayed a year and a half.

Q. And he went directly into the service from

(Deposition of Paul K. Gardner.)

his employment with you? A. He did.

Q. Do you feel that either your circulation as a newspaper or your business as a job printer has been adversely affected by the fact that you have not had the union label? A. No.

Q. Are there any other printing establishments in Lovelock, Nevada? A. No.

Q. And what is the nearest town at which there is a printing establishment?

A. Winnemucca, Nevada.

Q. And how far is that from Lovelock?

A. Seventy-two miles.

Q. Now, the salaries that you have mentioned were the salaries that you paid to your employees during 1950, were they not? [62] A. Yes.

Q. And what were the earnings of your wife and yourself from this business during the same period of time?

A. After deductions the joint income was under \$5,000.00 for both of us.

Q. Then you and your wife both devoting full time to the business were actually earning less than your employees? A. That is true.

Q. Are you a college graduate?

A. I am a graduate of the Drake University, Des Moines, Iowa; I have a Master's Degree from Iowa State College, Ames, Iowa. I did advance work at the University of Iowa. I took a semester at the University of Grenoble, France, and studied in the School of Journalism at the University of Iowa.

(Deposition of Paul K. Gardner.)

Q. And what was your degree received?

A. It was in English, a minor in geology.

Q. And is your wife also a college graduate?

A. She is a graduate of the University of Iowa and holds a Master's Degree from the University of Columbia, New York City.

Q. And in what field did she receive her Master's Degree? [63] A. In education.

Q. To what, if anything, did you attribute the fact that the joint earnings of your wife and yourself were less than that of your employees?

Mr. Wiener: I object on the ground it is not relevant and material, outside the scope of the issues, and calls for the opinion and conjecture on the part of the witness.

By Mr. Rudiak:

Q. You may answer the question subject to counsel's objection.

A. I would say because of high costs.

Q. And among those costs, of course, you would include primarily the wages of your employees?

A. Wages, materials and rents.

Q. I believe you testified that you owned the property.

A. I just own the equipment. I own the publication, including equipment. I do not own the building.

Q. At all times you rented the building?

A. That is right.

Q. What rents were you paying for it in 1950?

A. \$50.00.

(Deposition of Paul K. Gardner.)

Q. Is that \$50.00 per month?

A. Per month, yes. [64]

Q. And what was your monthly payroll to all your employees?

A. Now, you are talking about 1950?

Q. That is correct.

A. I was paying \$60.00 and guaranteed all maintenance of the building.

Mr. Gray: You are talking about rent now?

The Witness: Yes.

Mr. Gray: Back in 1950 it was \$60.00?

The Witness: \$60.00, yes. It was \$60.00 and the owner has no expense whatsoever in keeping it up.
By Mr. Rudiak:

Q. You are bound to make all repairs, is that right? A. All repairs, yes.

Q. And what was your monthly payroll during the same period?

A. I would have to figure that out.

Q. Just take your time.

A. Without overtime, roughly \$660.00.

Q. Was there often overtime?

A. Yes. [65]

Q. Can you estimate to what extent that might have increased the monthly payroll on the average?

A. As much as \$50.00.

Q. For each employee?

A. No; for one.

Q. Now, what was the approximate average cost of the materials that you used in your business in any given month?

(Deposition of Paul K. Gardner.)

A. I couldn't tell you that.

Q. Would you say that the cost of materials would be equal to the cost of labor?

A. They are greater.

Q. And what materials do you include in that?

A. Now, I am talking about materials, rent, all expenses. If you want expenses outside of labor, freight, express, postage, telegrams, insurance, upkeep on the business car, repairs, supplies, paper.

Q. Mr. Gardner, I wonder if you would confine yourself first to an answer to the specific question that I asked relative to materials which you used in your business.

A. I believe between \$8,000.00 and \$9,000.00—wait a minute; I really can't answer that. I wasn't instructed to bring anything and I didn't bring it. I could have brought it. [66]

Q. When you say \$8,000.00 or \$9,000.00 expenses, you are referring to the annual expense of all other operating expenses other than rent and labor; is that it? A. Yes.

Q. And you include in that, materials, utilities, insurance, upkeep on the car, and the other items that you have just mentioned? A. Yes.

Q. And you are unable at this time to make a breakdown as to how much of that would be for materials? A. I am.

Q. The automobile that you mentioned, of course, is used for your personal use as well, is it not? A. No, it is not.

Q. Do you have another car?

(Deposition of Paul K. Gardner.)

A. Yes, another car.

Q. Would it be correct to say that the cost of your labor represented at least one-half of your total cost of operation of the business? A. No.

Q. What percentage did it represent?

Mr. Gray: That is, if you know, Mr. Gardner.

The Witness: I know in a general way that expenses are greater than labor. I will have to [67] figure it up. I would say that the expenses were at least \$1,000.00 greater than the cost of labor.

Q. (By Mr. Rudack): And in those expenses you include the rent, do you? A. Yes.

Q. Now, isn't it a fact, Mr. Gardner, that when you say \$1,000.00, you refer to \$1,000.00 a year, do you not? A. Difference, yes.

Q. Isn't it a fact, Mr. Gardner, that for a long period of time you had felt somewhat aggrieved because your employees had for years been earning more than your wife and yourself, although your wife and yourself were college graduates and the owners of the business?

A. That is not true.

Q. Do you recall an interview which you had with Justice Charles Lee Horsey, the gentleman seated here to my left, in the month of October, 1950, at your place of business?

A. I remember part of it, yes.

Q. Do you recall that in the course of that interview you informed Justice Horsey that your employees were earning more than your wife and

(Deposition of Paul K. Gardner.)

yourself, who were college graduates and the owners of the business? [68]

The Court: It is now four o'clock. We will take our afternoon adjournment at this time, until tomorrow morning at ten o'clock.

(Jury admonished, excused. Court adjourned.)

Tuesday, Sep. 28, 1954, 10:00 o'clock a.m.

The Court: This is the case of Charles Lee Horsey vs. Southwestern Publishing Company, Inc., I think it would be well for the Clerk to call the roll of the venire.

(Clerk calls roll of jurymen.)

The Court: Will counsel stipulate that all members of the jury are present, and the alternate?

Mr. Souter: So stipulated, Sir.

Mr. Thompson: So stipulated, your Honor.

The Court: You may proceed.

(Mr. Paul K. Gardner's deposition still being read by counsel, with Counsel Bruce Thompson in the witness stand, and Counsel Louis Wiener reading the interrogation.)

Mr. Wiener: We were on page 21, if the Court please. Line 26.

(Question re-read, and quotation of deposition continued.) [68-A] A. I do not.

Q. Would you say that you did not make such a statement to Justice Horsey?

A. I would say neither way; I don't remember anything of the kind.

Q. You don't remember making such a state-

(Deposition of Paul K. Gardner.)

ment? A. No.

Q. Do you remember making a statement to the effect that your employees were earning more than your wife and yourself? A. To whom?

Q. To Justice Horsey?

A. I do not remember.

Q. Or did you make such a statement in his presence on that occasion?

A. I do not remember.

Q. Can you state positively that you did not make such a statement? A. I would not.

Q. In other words, you might have made such a statement? A. Sure.

Q. Isn't it a fact that on the occasion mentioned you also informed Justice Horsey that you felt that [69] labor was too powerful and that it was run by racketeers and highbinders?

A. I do not remember.

Q. Would you state positively that you did not make such a statement? A. No.

Q. Then is it a fact that you might have made such a statement on that occasion?

A. I could have.

Q. Isn't it a fact that on the occasion mentioned you also informed Justice Horsey that your earnings had been curtailed by corporations which now printed legal and business forms which you had formerly printed and sold?

A. I don't remember.

Q. Would you be able to state positively that you did not make such a statement?

(Deposition of Paul K. Gardner.)

A. No.

Q. Then it is a fact that you might have made such a statement? A. I could have.

Q. Isn't it a fact that you were, in fact, resentful because the earnings of your wife and yourself were not greater, although you were the owners of the business and both college graduates?

A. No. [70]

(End of quotation.)

Mr. Horsey: May it please the Court, the plaintiff objects to the introduction in evidence of—commencing with line 23 of page 23, of said deposition, and continuing down to page 26, line 24, on the ground and for the reason that said evidence is incompetent, irrelevant, and immaterial, and has nothing to do with the issues in this case.

The Court: The objection is sustained.

Mr. Wiener: For the purposes of the record, I think it should be——

The Court: All right, it will be deemed to have been offered and the offer is refused, objection sustained.

Mr. Wiener: At this time, if your Honor please, the defendants also offer that portion of the deposition commencing with line 9, page 32, to line 11, page 41.

Mr. Horsey: To which the plaintiff objects on the same ground and for the same reasons as previously offered.

The Court: Same ruling. The objection is sustained. The offer is rejected in both instances.

(Deposition of Paul K. Gardner.)

Mr. Wiener: Now, commencing with line 12, [71] page 41.)

(Quotation continuing, with Counsel Thompson on the witness stand, Counsel Wiener reading the interrogation.)

Q. During the year 1950, and prior to October 26th of that year, did you have any conversation or communication by any means relative to or involving Supreme Court Justice Horsey with any other person in the State of Nevada?

A. Yes.

Q. Who was that person or persons?

A. I am not sure.

Q. Do you remember the occasion in which Judge Horsey's name was mentioned?

A. I do not.

Q. But you do know that you had such a conversation? A. I do.

Q. Was it a resident of Lovelock, Nevada?

A. It is very vague in my mind.

Q. Do you remember the circumstances under which Justice Horsey's name was mentioned to you?

A. I do not.

Q. And you don't recall who the person was who brought up the subject? [72]

A. I do not.

Q. And was there more than one occasion at which Justice Horsey's name was mentioned to you prior to October 26th and during the year 1950?

A. I don't believe so.

Q. Are you acquainted with Justice Horsey?

(Deposition of Paul K. Gardner.)

A. I have only met him once that I know of, unless he might have been in the receiving line of a Governor's Ball once.

Q. What is the occasion at which you recall meeting him?

A. Besides the Governor's Ball?

Q. That is right.

A. When he called at my office in October of 1950.

Q. Do you recall whether or not you met Justice Horsey during the political campaign of 1946?

A. No.

Q. Would you say that you did not meet him, or that you do not remember?

A. My memory is absolutely vacant on that.

Q. Then the only two occasions that you remember are the Governor's Ball and the occasion when Justice Horsey called upon you in October of 1950?

A. I don't remember meeting him at the Governor's Ball.

Q. Then your original statement that you only met him on one occasion is the best of your present recollection?

A. I think so. If he was in the receiving line, I met him.

Q. To refresh your recollection do you recall who were the candidates for Justice of the Supreme Court during the political campaign of 1946?

A. No, I don't.

Q. If I were to tell you that the two opposing candidates were Justice Horsey and the present

(Deposition of Paul K. Gardner.)

Attorney General, Mathews, would that refresh your recollection of the event? A. No.

Q. Did your newspaper take any editorial stand on that election in 1946? A. No.

Q. Had your newspaper taken any editorial stand in any other prior or contested election for the office of Justice of the Supreme Court?

A. No.

Q. This occasion in October of 1950 was the first time that you had ever written an editorial relative to [74] the qualifications of a candidate for office of Justice of the Supreme Court?

A. Yes. I would qualify that, to the best of my knowledge.

Q. Now, you do recall a conversation that you had with Justice Horsey in the month of October, 1950?

A. I remember we had a conversation.

Q. Can you tell us approximately when that conversation occurred in the month of October, 1950?

A. I don't know. It was before the election.

Q. You do recall the editorial which appeared in the October 26th, 1950, issue of the Lovelock Review-Miner relative to Justice Horsey, which is the subject of this action? A. I do.

Q. And about how long before the publication of that editorial would you say that you met Justice Horsey at your office?

A. I would say either five days or twelve days.

Q. Now, that issue of the Lovelock Review-

(Deposition of Paul K. Gardner.)

Miner in which the editorial appeared came out on the regular publication date, that is, Thursday?

A. Yes.

Q. And you would say, then, that it was [75] either the preceding Saturday, or the Saturday a week before that you met Justice Horsey?

A. Saturday or Friday, some place along there, yes.

Q. Of either the week immediately preceding publication or the week before that?

A. That is right.

Q. And where did this conversation take place?

A. In the office of the Review-Miner.

Q. And who was present at that time?

A. Justice Horsey; a young man that he introduced as his son, and he was acting as his driver, who I remember was in the insurance business in Las Vegas. I believe he wore glasses and was slightly larger than I am.

Q. Were there any other persons present during this conversation? A. No.

Q. Following this interview with Justice Horsey at your office, did you have any further conversations or communications by any means with Justice Horsey? A. No.

Q. You have never communicated with him from that day until this?

A. No, not that I know of.

Q. Following your conversation with Justice [76] Horsey on this occasion in the month of October, 1950, and before publication of your edi-

(Deposition of Paul K. Gardner.)

torial on October 26, 1950, did you have any communication or conversation with any person or persons residing in Clark County relative to your interview with Justice Horsey or relative to his qualifications for office, or relative to your proposed editorials? A. No.

Q. Following your conversation with Justice Horsey and before publication of your editorial on October 26, 1950, did you have any communication or conversation with any person relative to your interview with Justice Horsey, his qualifications for office, or your proposed editorial?

A. Not that I remember.

Q. Well, would you say positively that you had no such conversations or communications?

A. My memory is no.

Q. Would you state positively, then, that you had no such communication or conversation?

A. I would say positively I had none.

Q. And did you discuss your proposed editorial with anyone following your interview with Justice Horsey and prior to publishing it? A. No.

Q. How soon after the interview did you write your editorial? [77] A. I don't know.

Q. Well, was it written the same day or the next day or a week later?

A. I remember I took notes on it.

Q. You took notes while you were talking to Justice Horsey?

A. Immediately after he left.

(Deposition of Paul K. Gardner.)

Q. Do you still have those notes in your possession? A. No.

Q. What has happened to them?

A. I save stuff like that about a month and then destroy it.

Q. How soon after making those notes did you actually write your editorial?

A. Before the publication came out in which it appeared.

Q. But you couldn't state whether it was within a day or two after the interview or immediately before the time of publication?

A. I don't remember.

Q. Is it your practice as a newspaper publisher and editor to discuss editorials which are controversial in their nature with any other person prior to publishing them?

A. No. Since my wife became a partner we [78] often discussed things.

Q. But that was not your practice in October of 1950? A. No.

Q. Now, returning to your interview with Justice Horsey, just what was said to the best of your recollection? A. By both of us?

Q. Just repeat the conversation as best—as you remember it.

A. He came down and came in and introduced his son and sat down in the guest chair and told about his mission. That is all I remember of that part of it.

Then I said to him something to this effect:

(Deposition of Paul K. Gardner.)

“What about the report that you are pro-labor?”
He arose and started walking the floor. I remember he took off his nose glasses and shook them up and down, and he said to this effect: “I admit that I am pro-labor. The decisions of the Nevada Supreme Court are pro-labor. Therefore I am pro-labor.”

Q. Was that the substance of the conversation?

A. That is all I remember—no, it isn’t either. I said to him, “Don’t the Supreme Court ever change its decisions? The United States Supreme Court changes its mind.” [79]

As I remember it there was no answer to that.

Q. Was any mention made in the course of your conversation with Justice Horsey of the so-called White Cross decision of the Supreme Court of the State of Nevada?

A. Not that I remember.

Q. Was any mention made during the course of the interview as to Justice Horsey’s prior record as a member of the State Legislature of the State of Nevada with reference to legislation commonly called “labor legislation?”

A. No.

Q. Did you question Justice Horsey at that time as to what he meant by his statement to you when he allegedly admitted that he was pro-labor?

A. No.

Q. The word “pro-labor” had a definite meaning to you at that time?

A. As expressed in my editorial, yes.

Q. Now, why did you ask Justice Horsey about this alleged report that he was pro-labor?

A. I was very anxious for Justice Horsey to

(Deposition of Paul K. Gardner.)

come because I wanted to get acquainted with him and sound him out on this thing. My mind at the time was entirely open toward the Judge. When he came in I was happy that he arrived so that I could ask him the question. [80]

Q. Had you any reason to believe that he was pro-labor prior to the time that he arrived?

A. I did.

Q. And what was the source of that information?

A. I don't know.

Q. You surely didn't get it out of thin air. Do you recall who it was that gave you that thought?

A. I do not, I haven't the least idea.

Q. Could it have been from some publication of the Nevada Citizens Committee which you received?

A. I don't believe so.

Q. But it could have been?

A. It was from some person, some person well up in Nevada life, but I don't know who it was.

Q. And you took the word of this person at that time?

A. To form the question.

Q. Did you make any attempt to investigate Justice Horsey's record prior to the time of the interview to find out whether or not he was pro-labor?

A. I did not.

Q. Did you attempt after your interview with Justice Horsey to further investigate his record in regard to such matters? [81]

A. I took his own word for his stand on labor matters.

(Deposition of Paul K. Gardner.)

Q. About how long did your conversation with Justice Horsey last in all?

A. I would say five minutes.

Q. And was the gentleman who was introduced to you as his son present during all of that conversation? A. Yes.

Q. At this time I will ask you, Mr. Gardner, whether you have with you a copy of the October 26, 1950, issue of the Lovelock Review-Miner?

A. I have.

Mr. Rudiak: I will ask the reporter to mark that Exhibit A. May the record show that counsel stipulate that Exhibit A annexed to this deposition is a true copy of the issues of the Lovelock Review-Miner published on October 26, 1950?

Mr. Wiener: We will so stipulate.

(A copy of the October 26, 1950, edition of the Lovelock Review-Miner was marked Plaintiff's Exhibit A by the Notary Public.)

Mr. Rudiak: It is also stipulated that the reporter may copy from page 1 of Exhibit A an editorial entitled "Your Editor Plans to Vote Against Justice Horsey on [82] November 7th."

(End of quotation.)

Mr. Wiener: At this time, if your Honor please, we would like to offer in evidence, the copy of the editorial, dated October 26, 1950, and ask that it be marked as Defendants' Exhibit A.

The Court: Defendants' Exhibit A.

Mr. Horsey: No objection.

(Deposition of Paul K. Gardner.)

The Court: It will be admitted in evidence. Defendants' Exhibit A.

Mr. Wiener: Now, commencing again on page 52 of the deposition. By Mr. Rudiak.

(Quotation, line 1, page 52 continuing)

Q. You stated a few moments ago in response to one of my questions that Justice Horsey said to you that, "The decisions of the Nevada Supreme Court are pro-labor, and therefore I am pro-labor."

Did you repeat the full contest of this statement in your editorial which appeared in the October 26, 1950, issue of the Lovelock Review-Miner?

A. So far as I remember, I did.

Q. Now, in the course of his conversation with you on the occasion that we have been discussing, did Justice [83] Horsey inform you that he was in favor of labor racketeers? A. No.

Q. Now, in the course of his conversation with you did Justice Horsey make use of the words, "labor racketeers"? A. No.

Q. Exactly what is it that he told you relative to his attitude towards labor?

A. Exactly what I have told you.

Q. For clarification would you explain that to us again?

A. As I remember it he said, "I admit I am pro-labor. The decisions of the Supreme Court of Nevada are pro-labor. Therefore, I am pro-labor."

Q. And he didn't further qualify his statement?

A. I don't remember anything else.

(Deposition of Paul K. Gardner.)

Q. Can you state positively that he didn't further qualify his statement?

A. I would say positively I don't remember anything else.

Q. Well, just answer my questions, please. Will you state positively that Justice Horsey did not further qualify his statement to you at that time?

A. Not to my knowledge. [84]

Q. Then you would say that it is possible, in accordance with your present state of recollection, that he did make some qualifying statement?

Mr. Gray: He didn't say anything of the kind, counsel.

Mr. Rudiak: Well, it is the converse, Mr. Gray.

Mr. Gray: That is argumentative.

The Witness: For the first time, last night, I saw a copy of your complaint, and I was startled at the addition to what is claimed to have been in that conversation, because so far as it was concerned, my mind was a perfect blank.

There is something that I left out, if you want it. At the end of his statement he laughed.

By Mr. Rudiak:

Q. Mr. Gardner, did you discuss your editorial with anyone after its publication on October 26, 1950, and before the time of the election which took place on November 7, 1950?

A. No, not that I know of.

Q. Did you have any communications with anyone relative to your editorial between the time of

(Deposition of Paul K. Gardner.)

its publication and the election on November 7, 1950?

A. Somebody called me up from Las Vegas by [85] telephone.

Q. Who was that? A. I don't know.

Q. Didn't this person identify himself to you?

A. He acted as if he knew me, called me by my first name, but I don't know who it was.

Q. He didn't tell you who he was?

A. He did, but I don't know who it was now.

Q. And approximately when did that happen?

A. That happened before this publication was made in the Las Vegas newspaper.

Q. Was it Mr. A. E. Cahlan who called you at that time? A. I couldn't tell you.

Q. Was it Mr. John F. Cahlan? A. No.

Q. Was it Mr. Wilson Baden whose name has been mentioned here before?

A. I don't know.

Q. What was the substance of the conversation that took place at that time?

A. He called attention to my editorial, and as I remember, had prepared a statement which was read to me. This person asked me if it could be used, and I said, "No, [86] not with my consent."

He said, "Can we use your editorial?" I said, "I can't prevent you from using my editorial because it isn't copyrighted."

Q. Did he tell you what use he proposed to make of the copy that he read you over the telephone? A. Some kind of a political ad.

(Deposition of Paul K. Gardner.)

Q. Did this phone call come from Las Vegas, Nevada? A. Yes.

Q. Had you ever had any previous conversation with the person who called you on that day?

A. I didn't recognize his name at all, although he called me "Paul", but I didn't recognize him.

Q. And the copy that he read you over the phone, was that the same copy that later appeared in the advertisement in the Las Vegas Review-Journal? A. No.

Q. Have you ever seen the advertisement in the Las Vegas Review-Journal?

A. The one that finally came out?

Q. Yes. A. Yes.

Q. And you first saw that last night when you read your complaint? [87] A. Yes.

Q. And you are quite certain in your own mind, although approximately two years have elapsed since that time, that the copy that was read you over the telephone is not the same copy as appeared in the advertisement in the Las Vegas Review-Journal?

A. Yes, I am very definite about that.

Q. Why did you refuse him permission to print the proposed copy?

A. Well, after two years I have a vague memory that it was not fitting; it did not fit into what I had said. There may have been additions to it or interpretations of it, I don't know, for sure.

Q. How long have you been in the newspaper business in Nevada in all, Mr. Gardner?

(Deposition of Paul K. Gardner.)

A. Twenty-two years nine months.

Q. In your experience as a newspaper editor and publisher have you ever seen the name of any person printed completely in lower case letters in any newspapers circulated in the State of Nevada prior to the time that you saw our complaint last night? A. No.

Q. During the war years did you ever see the name of Hitler or the name of Stalin printed entirely in lower case letters in any newspaper circulated in the State of [88] Nevada? A. No.

Q. That would, of course, include newspapers published outside the State of Nevada?

A. I have never seen it.

Q. Does the use of lower case letters entirely in printing the given name and surname of the person referred to in a newspaper story or advertisement have any special meaning or connotation in the newspaper business in Nevada that you know of? A. Not to my knowledge.

Mr. Rudiak: That is all.

Mr. Gray: We have no questions.

(End of Quotation.)

Mr. Wiener: We will call Mr. Cahlan.

A. E. CAHLAN

having been first duly sworn, called as a witness on behalf of the defendants, took the stand and testified as follows:

Direct Examination

By Louis Wiener, Jr. [89]

Q. Will you state your name, please?

A. A. E. Cahlan.

Q. And are you one of the defendants in this action? A. I am.

Q. And what is your present business or occupation?

A. General manager of the Southwestern Publishing Company.

Q. That is the publisher of the Las Vegas Review-Journal? A. That is right.

Q. Are you acquainted with the plaintiff in this action, Charles Lee Horsey? A. I am.

Q. And how long have you known him?

A. Twenty-eight years.

Q. And you knew him when he first came to Las Vegas, Nevada? A. I did.

Q. Now, during the course of your acquaintance with Judge Horsey, have you ever had the relationship of attorney and client with him?

A. I have.

Q. And in that relationship Judge Horsey [90] represented the Las Vegas Review-Journal?

A. That is right.

Q. Now, during your period of acquaintanceship with Judge Horsey, since 1926, did you support or

(Testimony of A. E. Cahlan.)

oppose Judge Horsey in any electionship in which he was a candidate? A. I supported him.

Q. Now, do you remember the first campaign in which you supported Judge Horsey?

A. I think it was the year he ran for congress. The first time.

Q. Now, at the present time, Mr. Cahlan, do you hold any feeling of animosity toward Judge Horsey? A. Certainly not.

Q. At the time of the publication of the advertisement on November 5, 1950, which is marked Plaintiff's Exhibit 3, did you have any personal animosity toward Judge Horsey?

A. I did not.

Mr. Wiener: No further questions.

Cross Examination

By Clyde D. Souter:

Mr. Souter: Q. Mr. Cahlan, you were one [91] of the organizers of the Nevada Citizens Committee, were you not? A. I was not.

Q. You attended the first organization meeting and addressed it, did you not? A. I did not.

Q. And if the records of the Nevada Citizens Committee, which are here in Court, indicate your presence and the fact that you did address it, you would say that those records are incorrect?

A. I would say that they were, and may I explain my answer?

Q. Yes.

A. When the Nevada Citizens Committee was

(Testimony of A. E. Cahlan.)

originally formed I was advised of the formation of the Citizens Committee and asked whether or not I would accept a directorship on that committee. I was informed, as I recall it, that I had been chosen as one of the directors. I told them I would prefer not to serve.

Q. And did you attend the first meeting, and in order to discuss that situation with them?

A. My recollection, Judge, is that they had the first meeting at the Last Frontier Hotel, and I did not attend.

Q. Were you ever a member of the Publications [92] Committee? A. I wasn't.

Q. And if the records of the Nevada Citizens Committee show that you were, that was a mistake?

A. Judge, let me explain it this way: I think they chose a lot of people at those meetings, sometimes, and then never notified them that they were chosen. So far as I am concerned during that particular campaign, I took very little part with the Nevada Citizens Committee.

Mr. Souter: That is all, Mr. Cahlan.

Mr. Thompson: The defense rests, your Honor.

Mr. Souter: May we approach the bench?

The Court: Certainly.

(Counsel approach bench.)

Mr. Souter: At this time, if the Court please, I offer in evidence on behalf of the plaintiff, the general election returns of 1946, for the state of Nevada. The original returns.

Mr. Wiener: To that offer, your Honor, we ob-

ject on the ground that the offer, without being offered, is wholly irrelevant and immaterial. That it is speculation. Remote and prejudicial to receive such a document in evidence in this action. [93]

Mr. Souter: It is not offered, if the Court please, for the purpose of anything connected with the loss of an election, it is offered for—purely and simply as possible evidence of the effect of the advertisement in question upon the people of Clark County.

The Court: When it was first offered I was inclined and did rule against the admission of that evidence on the theory that the loss of an election had no bearing upon any of the merits of this case, but now, in view of the statement of counsel, as to its limited purpose, as a circumstance intending to show the effect of the publication in Clark County, it will be admitted in evidence.

(Exhibit 2-A admitted in evidence.)

Now, what number is that?

Clerk: Number four, Sir.

The Court: It will be number five. Give it the number next in order. We rejected number four, that was an offer of one of the Supreme Court decisions of the state of Nevada.

Mr. Souter: It had never been marked.

The Court: Well, that exhibit of the Supreme Court decision, rejected, should be marked 4. And this one, next in order.

Clerk: That will be re-numbered 5.

(Exhibit 2-A renumbered to Exhibit 5.) [94]

The Court: Exhibit 5. Very well.

Mr. Souter: The Plaintiff rests, Sir.

The Court: If there is no further testimony on this occasion, we will excuse the members of the jury until two o'clock this afternoon. I would like to see counsel in chambers.

(Adjournment at 11:00 o'clock a.m.)

Tuesday, Sept. 28, 1954, 2:00 o'clock p.m.

The Court: May the record show the presence of the parties and counsel, and that the jury is not present.

The Court now informs the parties and their counsel that the Court proposes to give instructions numbered one to seventeen inclusive, copies of which counsel have, and at this time the Court will entertain any objections which the counsel for the plaintiff have to the proposed instructions, numbered one to seventeen inclusive.

Mr. Souter: We have none, Sir.

The Court: And have counsel for the defendants any objections to proposed instructions numbered one to seventeen inclusive? [95]

Mr. Wiener: No, your Honor.

(Jury called in.)

(Opening statement to the Jury on behalf of the Plaintiff made by Mr. Souter.)

(Followed by statement to the Jury on behalf of the Defendants first by Mr. Thompson, followed by Mr. Wiener.)

(Recess taken at 3:30 o'clock p.m.)

After Recess.

The Court: You have completed your argument to the Jury, Mr. Wiener.

Mr. Wiener: We have, your Honor.

The Court: Very well.

(Closing argument given to the Jury by Mr. Souter.)

(Instructions read to Jury by the Court.)

(Alternate Juror Mr. Balance excused.)

The Court: Now, the Court will be in recess awaiting the pleasure of the Jury.

(Exhibits given to Jury. Jury retired at 4:15 o'clock p.m.)

Evening Session, Tues., Sept. 28, '54, 11 o'clock p.m.

The Court: The record will show the presence of the parties and their counsel. The clerk will please call the roll of the venire.

(Roll taken of members of Jury.)

The Court: Ladies and gentlemen of the Jury, have you reached a verdict in the case on trial here?

Mrs. Hall: We have, your Honor.

The Court: Will you please hand it to the marshal?

(Verdict handed to marshal, then to the Court, and then to the Clerk, who reads.)

Clerk: United States District Court for the District of Nevada, Case No. 1025, Charles Lee Horsey, Plaintiff, vs. Southwestern Publishing Company, Inc., a Nevada corporation; A. E. Cahlan; and Nevada Citizens Committee Incorporated, Southern Nevada Chapter, a Nevada corporation, defendants.

Verdict. We, the jury in the above-entitled case, find in favor of the plaintiff and against the defendants in the amount of \$10,000.00 as compensatory damages, and \$15,000.00 as punitive damages. Dated this 28th day of September, 1954. Signed, Barbara Hall, foreman.

Is that your true verdict?

Jury: It is.

Clerk: So say they all, your Honor.

The Court: Does counsel desire to have [97] the Jury polled?

Mr. Thompson: We do not.

Mr. Souther: We do not.

(Brief statement given by the Court to the Jury. Court adjourned 11:30 o'clock p.m. [98])

[Endorsed]: Filed March 8, 1955.

[Endorsed]: No. 14738. United States Court of Appeals for the Ninth Circuit. Southwestern Publishing Co., Inc., a corporation, A. E. Cahlan, Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, a corporation, Appellants, vs. Charles Lee Horsey, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: April 25, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14738

CHARLES LEE HORSEY,

Plaintiff-Respondent,

vs.

SOUTHWESTERN PUBLISHING CO., INC.,

et al.,

Defendants-Appellants.

STATEMENT OF POINTS

The points upon which the appellants, and each of them, will rely on appeal are:

1. The damages awarded are grossly excessive.
2. The damages awarded are contrary to law.
3. The verdict and judgment entered pursuant thereto are contrary to law.
4. The verdict and judgment entered pursuant thereto are contrary to the evidence.
5. The verdict is excessive and appears to have been given under the influence of passion and prejudice.
6. The Court erred in admitting irrelevant and incompetent evidence by plaintiff, over defendants' objection, as follows: Election returns for Clark County, Nevada, for 1946 and 1950, setting forth the number of votes cast in each of said elections for the office of Justice of the Supreme Court of the State of Nevada.
7. The Court erred in granting a motion for new trial to plaintiff.

8. The Court erred in refusing to grant a new trial to defendants on the second trial of said action.

9. The Court erred in refusing to direct a verdict in favor of the defendants and each of them.

JONES, WIENER & JONES,

/s/ By HERBERT M. JONES,

Attorneys for Defendants-Appellants Southwestern
Publishing Co., Inc., and A. E. Cahlan

BRUCE R. THOMPSON, HOWARD

GRAY and MILTON W. KEEFER

/s/ By MILTON W. KEEFER,

Attorneys for Defendant-Appellant Nevada Citi-
zens Committee, Incorporated, Southern Nev-
ada Chapter

[Endorsed]: Filed May 6, 1955. Paul P. O'Brien,
Clerk.

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING Co., INC., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCORPORATED,
SOUTHERN NEVADA CHAPTER, a corporation,
Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANTS' BRIEF.

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*Attorneys for Appellants A. E. Cahlan and
Southwestern Publishing Co., Inc.*

FILE

SEP 27 195

PAUL B. O'BRIEN,

TOPICAL INDEX

	PAGE
Jurisdiction	1
Statement of the case.....	2
Summary of the argument.....	5
Specification of errors.....	6
Argument	9
An interpretation of the law of defamation which will permit damages to be assessed against a citizen or a newspaper for a publication of the type here involved infringes the funda- mental principles of free speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States	9
The complaint does not set forth, and the evidence does not establish, a libelous publication.....	11
There is no proof to support the verdict and judgment for ten thousand dollars compensatory damages.....	14
There is no evidence of express malice to support the verdict and judgment for fifteen thousand dollars punitive damages	15
The trial court erred in admitting in evidence the 1946 and 1950 election returns, to appellants' prejudice.....	15
Conclusion	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
American Communications Assn. v. Douds, 339 U. S. 382, 94 L. Ed. 925.....	11
Chaplinsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031....	11
Culinary Workers v. Court, 66 Nev. 202, 210 P. 2d 454.....	13
DeJonge v. Oregon, 299 U. S. 353.....	10
Nevada State Journal Publishing Co. v. Henderson, 294 Fed. 60	12, 15
Otero v. Ewing, 115 So. 633, 165 La. 398.....	14, 15
Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879.....	11
Pennekamp v. Florida, 328 U. S. 331, 90 L. Ed. 1295.....	13
Talbert v. Mack, 41 Nev. 245, 169 Pac. 25.....	14
Terminello v. Chicago, 337 U. S. 1, 93 L. Ed. 1131.....	11
Thompson v. Powning, 15 Nev. 195.....	14

RULES

Federal Rules of Civil Procedure, Rule 73.....	2
--	---

STATUTES

United States Code, Title 28, Sec. 1332.....	1
United States Code, Title 28, Sec. 1291.....	2
United States Constitution, First Amendment	9, 11
United States Constitution, Fourteenth Amendment.....	11

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING Co., Inc., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCOR-
PORATED, SOUTHERN NEVADA CHAPTER, a corporation,
Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANTS' BRIEF.

Jurisdiction.

Jurisdiction of the District Court in this case is based on diversity of citizenship (28 U. S. C. 1332). It was alleged in the Complaint [R. 3] that planitiff was a citizen of the State of California, and defendants, and each of them, were citizens of the State of Nevada; that defendant Southwestern Publishing Co., Inc., was a Nevada corporation, and that defendant Nevada Citizens Committee, Incorporated, Southern Nevada Chapter, was a

TABLE OF AUTHORITIES CITED

CASES

PAGE

American Communications Assn. v. Douds, 339 U. S. 382, 94 L. Ed. 925.....	11
Chaplinsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031....	11
Culinary Workers v. Court, 66 Nev. 202, 210 P. 2d 454.....	13
DeJonge v. Oregon, 299 U. S. 353.....	10
Nevada State Journal Publishing Co. v. Henderson, 294 Fed. 60	12, 15
Otero v. Ewing, 115 So. 633, 165 La. 398.....	14, 15
Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879.....	11
Pennekamp v. Florida, 328 U. S. 331, 90 L. Ed. 1295.....	13
Talbert v. Mack, 41 Nev. 245, 169 Pac. 25.....	14
Terminello v. Chicago, 337 U. S. 1, 93 L. Ed. 1131.....	11
Thompson v. Powning, 15 Nev. 195.....	14

RULES

Federal Rules of Civil Procedure, Rule 73.....	2
--	---

STATUTES

United States Code, Title 28, Sec. 1332.....	1
United States Code, Title 28, Sec. 1291.....	2
United States Constitution, First Amendment	9, 11
United States Constitution, Fourteenth Amendment.....	11

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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APPELLANTS' BRIEF.

Jurisdiction.

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Nevada corporation [R. 4-5]. The California citizenship of plaintiff was proved [R. 106]. The Nevada citizenship of the remaining individual defendant and the fact of incorporation in Nevada of the corporate defendants were admitted [R. 33, 34, 420]. The matter in controversy exceeds \$3,000, exclusive of interest and costs. This was alleged in the Complaint [R. 3]. The prayer was for \$328,871.05 in damages [R. 20]. The verdict and judgment appealed from was for \$25,000 [R. 88].

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U. S. C. 1291), and the timely invocation, by Appellants, of the prescribed procedure [Rule 73, Fed. Rules Civ. Proc.; R. 97-103].

Statement of Case.

On November 7, 1950, a general election was held in the State of Nevada in which plaintiff, Charles Lee Horsey, was a candidate for the office of Justice of the Supreme Court of Nevada, running as the incumbent against Charles M. Merrill, who defeated him. During the campaign, plaintiff visited the office of Paul K. Gardner, publisher of the Lovelock Review-Miner, a weekly newspaper [R. 146], in the month of October, 1950. A conversation ensued between Judge Horsey and Mr. Gardner, in the presence of Charles Lee Horsey, Jr., in which Mr. Gardner inquired: "Are you a pro-labor?" Judge Horsey replied: "Yes, I have always been for labor" [R. 115].

Subsequently Mr. Gardner wrote and published an editorial [Deft. Ex. A, R. 170] in the October 26, 1950 issue of the Lovelock Review-Miner, reading as follows:

“YOUR EDITOR PLANS TO VOTE AGAINST JUSTICE
HORSEY ON NOVEMBER 7TH

“An Editorial, by Paul K. Gardner

“Your editor is going to vote against Supreme Court Justice Chas. Lee Horsey on November 7.

“The reason is that he has a biased viewpoint on certain cases coming before him.

“When the justice called at The Review-Miner office recently while conducting his campaign, the following conversation took place:

“Editor: ‘What about the report that you are pro-labor?’

“Justice Horsey: ‘I admit I am.’ Then he chuckled.

“No justice has any buisness on the bench who has a bias. He is sworn to approach each case with an open mind. Each case must be considered on its merits. A judge with opinions, not subject to change, cannot do that.

“By pro-labor is meant labor racketeers. The laboring man, in and out of the union, seeks only a fair deal. The labor racketeers seek to gain ends whether fair or not.

“Such a case recently came before Justice Horsey. It had to do with a law adopted in 1913. He joined with Justice Eather in declaring it unconstitutional. It took away the right of a business to prosperity without having recourse to the courts of justice by giving the right to labor racketeers to harass it.

“Involved was the White Cross Drug Store of Las Vegas. There was no labor difficulty. The employees were well paid, satisfied and nonunion. The labor

racketeers demanded that the store be unionized against the will of the workers and the owner. When refused, pickets were ordered in front of the store. An injunction was obtained, as we understand the matter. Justice Horsey ruled that the law under which the injunction was issued was no good. In effect, he gave the racketeers permission to put on pickets indefinitely to drive union patronage away. Such ruling enables the racketeers to force every business in the country into union contracts whether the owners or their employers were in favor of it or not. In other words, it deprives an owner from conducting a profitable business and working people of the right to work.

“It makes no difference to us: Any man who is prejudiced in favor of business, labor, labor racketeers, farming or gambling, has no business on the Nevada supreme court bench.”

Judge Horsey read the editorial during the campaign and did nothing about it [R. 132].

On November 5, 1950, defendants published, and caused to be published, in the Las Vegas Review Journal, a daily newspaper published at Las Vegas, Nevada, a political advertisement, reprinting the Gardner editorial in full, and accompanying it with exhortations to vote against Judge Horsey [R. 10-13; Pltf. Ex. 3; R. 112].

On July 22, 1952, plaintiff filed this action for damages. After a second trial, the jury returned a verdict in favor of plaintiff for \$10,000 compensatory, and \$15,000 punitive damages [R. 182]. The trial court refused a new trial [R. 95].

Summary of Argument.

As the argument will disclose, the principal difficulty in this case stems from the refusal of the jury, and of the trial court itself, to follow the law applicable to a case of this character, as set forth in the instruction of the court. Neither the Complaint, with or without the innuendo, which was not proved, nor the evidence establishes a cause of action. To permit a jury or court to render judgment for damages on account of a publication of this character, violates the First and Fourteenth Amendments to the Constitution of the United States. The record is void of proof of special damage; hence, under the Nevada law applicable here, a judgment for nominal damages only was recoverable, assuming the publication to be actionable. Further, the evidence of the consequences supposedly suffered from the advertisement shows that they stemmed actually from the loss of the election rather than from the publication itself. No evidence of express malice was adduced to support a judgment for exemplary damages; and the rulings of the trial court admitting in evidence the 1946 and 1950 election returns were erroneous and prejudiced the Appellants.

Specification of Errors.

1. The verdict of the jury and the judgment entered thereon [R. 181, 88] are contrary to law and are not supported by the evidence.

2. The damages awarded are grossly excessive and are not supported by the evidence.

3. The trial court erred in denying Appellants' Motion for New Trial on each of the grounds therein alleged [R. 91-95].

4. The trial court erred in admitting, over objection, Plaintiff's Exhibit 2, an official publication of the returns of the general election in Nevada for the year 1950, the following being a quotation of the proceedings [R. 110-112]:

"Mr. Souter: Expressly not for the purpose of showing the loss of an election, but for the sole purpose of indicating a state of opinion in Clark County, I would now like to offer in evidence, the official returns of the general election of the state of Nevada for the year 1946, and the official returns of the general election of the state of Nevada of 1950, insofar as those returns indicate the vote in Clark County, in those two elections, for Mr. Justice Horsey, for Justice of the Supreme Court of Nevada.

Mr. Thompson: We would like to object to the offer just made, your Honor, on the ground that the offer of evidence offered is wholly irrelevant and immaterial. Judge Souter's offer recognizes his and our understanding of the law, that the loss of an election is not a proper element of damages in a case of that character, because it's too speculative and remote, and no one can properly judge the reasons why a person wins or loses an election, for all of the reasons which go together to achieve that result.

Now, if that is the law, as we understand it to be, the evidence offered is doubly immaterial for the purpose suggested by Judge Souter and is doubly speculative and remote and incompetent, because if the loss of the election itself is immaterial in this case, well, the reaction of the voters in any particular area of this state, is equally immaterial, speculative, remote and incompetent.

The Court: I should think that the 1950 election returns might be admitted, but I can't see any relevance to the 1946 returns.

Mr. Souter: For the purpose of the contrast.

The Court: Well, we know he was elected in 1946. It has already been testified to.

Mr. Souter: But my thought in that connection, I respectfully submit to your Honor, is this, that this advertisement that is the subject matter of this suit, was published in Clark County, and came to the attention of the people in this county, I think—

The Court: I think the 1950 returns ought to be admitted. I will admit the 1950 returns, but the 1946 are not admitted.

Mr. Thompson: Inasmuch as Judge Souter made a combination offer, I think it behooves me to object singly to the return for the year 1950 upon the grounds which I stated as to the returns for 1946.

The Court: The record may show that the objection is overruled as to the 1950 returns."

5. The trial court erred in admitting, over objection, Plaintiff's Exhibit 5, an official publication of the returns of the general election in Nevada for the year 1946, the following being a quotation of the proceedings [R. 178-179]:

"Mr. Souter: At this time, if the Court please, I offer in evidence on behalf of the plaintiff, the gen-

eral election returns of 1946, for the state of Nevada. The original returns.

Mr. Wiener: To that offer, your Honor, we object on the ground that the offer, without being offered, is wholly irrelevant and immaterial. That it is speculation. Remote and prejudicial to receive such a document in evidence in this action.

Mr. Souter: It is not offered, if the Court please, for the purpose of anything connected with the loss of an election, it is offered for—purely and simply as possible evidence of the effect of the advertisement in question upon the people of Clark County.

The Court: When it was first offered I was inclined and did rule against the admission of that evidence on the theory that the loss of an election had no bearing upon any of the merits of this case, but now, in view of the statement of counsel, as to its limited purpose, as a circumstance intending to show the effect of the publication in Clark County, it will be admitted in evidence.

(Exhibit 2-A admitted in evidence.)

Now, what number is that?

Clerk: Number four, Sir.

The Court: It will be number five. Give it the number next in order. We rejected number four, that was an offer of one of the Supreme Court decisions of the State of Nevada.

Mr. Souter: It had never been marked.

The Court: Well, that exhibit of the Supreme Court decision, rejected, should be marked 4. And this one, next in order.

Clerk: That will be re-numbered 5.

(Exhibit 2-A renumbered to Exhibit 5.)

The Court: Exhibit 5. Very well."

ARGUMENT.

An Interpretation of the Law of Defamation Which Will Permit Damages to Be Assessed Against a Citizen or a Newspaper for a Publication of the Type Here Involved Infringes the Fundamental Principles of Free Speech Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The defendants in this case are protected by the First Amendment to the Constitution of the United States providing:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.”

Here we have under consideration the judgment of a United States District Court, acting through the duly appointed judge of that court and a jury duly impaneled and sworn therein, assessing \$25,000 in damages against defendants who did nothing more than express an opinion regarding the qualification of a candidate for public office in furtherance of opposition to his candidacy.

Admittedly, a truly defamatory publication wrongfully and falsely charging facts impugning a person's character and holding him up to obloquy, contempt and ridicule is not within the protection of the constitutional safeguards. But we earnestly contend that whenever a judge or jury is suffered to assess damages on account of an allegedly defamatory publication which is not in fact libelous, the judgment and verdict are void and unconstitutional. Any extension of the time-honored principles defining ac-

tionable defamation which names as an allegation of fact that which is merely an expression of opinion, or which restricts the established right of fair comment and criticism upon candidates for public office and upon the conduct and decisions of our courts is an infringement upon the constitutional assurances established by our forefathers for the preservation of our democracy. One need only reflect for a moment upon the disastrous consequences which would ensue from the abolition of the privilege of fair comment and criticism to appreciate the importance in this field of the controlling voice of the First and Fourteenth Amendments.

Tribute to the overshadowing importance of the guaranties of the First Amendment to the preservation of our Government has frequently and eloquently been paid; but seldom with the conciseness and directness of the language of Chief Justice Hughes in the case of *De Jonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278, when he said:

“But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”

Freedom of speech and of the press means freedom from punishment as well as from prior restraint. (*Chap-*

linsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031; *Terminello v. Chicago*, 337 U. S. 1, 93 L. Ed. 1131; *Patterson v. Colorado*, 205 U. S. 454, 51 L. Ed. 879.) Further, their protection applies to the imposition of civil disabilities and penalties, as well as to criminal punishment and prior censorship. (*American Communications Ass'n v. Douds*, 339 U. S. 382, 94 L. Ed. 925.)

From our study, it would appear that occasion infrequently has arisen to invoke the First and Fourteenth Amendments in civil damage actions based on defamation of character. Nevertheless, the great necessity of strictly hewing to well established limitations of actionable libel and of applying with practical appreciation the concepts of privilege in this field, would appear crystal clear; else the freedoms guaranteed by the Constitution may be dangerously encroached upon. For threat of being mulct in damages, running to thousands of dollars, whether for indefinable "compensatory" damages for injury to reputation, or equally illimitable "punitive" damages for alleged malicious intent may well prove to be a more potent stricture upon freedom of expression than any form of censorship or criminal punishment yet devised.

The Complaint Does Not Set Forth, and the Evidence Does Not Establish, a Libelous Publication.

The Complaint alleges as libel the publication of the political advertisement relating to plaintiff's candidacy for the office of Justice of the Supreme Court of Nevada. True, the Complaint [Par. XII, R. 13] seeks to lay an innuendo respecting the form of the ad, that is, the printing of plaintiff's name in lower case letters. But there is absolutely no proof of the innuendo. In fact, what proof there is in the record is to the contrary [R. 175].

Further, proof of the innuendo, if available, would not aid, for, surely, any person or publisher may print or say specifically that he “dislikes” a person, or that he “holds him in contempt” without incurring liability for defamation.

The Court, in Instruction No. 9 [R. 82], properly instructed the jury regarding the applicable law. (*Nevada State Journal Publishing Co. v. Henderson*, 294 Fed. 60 (9th C. C. A.).) The difficulty is that neither the jury, in reaching a verdict, nor the Court in denying a new trial or in its preliminary orders prior to trial, followed the law as set forth in this instruction.

Mindful that the sole evidence before us is the publication itself, let us examine it in the light of the admonition of Instruction No. 9:

“But the distinction must be drawn between comment and criticism, and untrue charges of facts constituting a crime of disgraceful conduct. It is one thing to pass severe criticism upon, or to draw even extreme inferences from, acknowledged facts, or to indulge in intemperate denunciation, even though bitter, and quite another thing to assert the existence of particular acts of criminality or of shameful misconduct upon the candidate’s part.”

We may properly inquire: Where in this ad is any act of criminality or shameful misconduct on the part of plaintiff averred? Where is there any untrue charge of any fact constituting a crime or disgraceful conduct? Where is any fact, as distinguished from opinion, alleged at all?

The only factual statement in the entire publication is the recitation of the conversation between plaintiff and Paul K. Gardner, a conversation which was correctly reported according to unanimous testimony [R. 115, 132, 137-138, 168]. In the face of an express admission of a pro-labor bias, is it wholly unreasonable for a listener to discount the protestation that the bias was not permitted to influence official judgment [R. 116], or the assertion that plaintiff was, in effect, two persons [R. 133]? And this in the setting of the opinion written by Judge Horsey just one year previously in *Culinary Workers v. Court*, 66 Nev. 202, 210 P. 2d 454, an opinion which has baffled more technically trained minds than Editor Gardner's.

If a candidate for judicial office cannot be opposed by opinion regarding his bias and prejudices, whether on the basis of his background, the parties he has represented in private practice, or his admitted bias, what is the field of free discussion of his candidacy? What comments and criticisms can be made? Are we limited to discussing his physiognomy, as represented by newspaper portraits?

In analyzing the reaction of the trial judge to his publication, we may paraphrase the language of Justice Frankfurter in *Pennekamp v. Florida*, 328 U. S. 331, 90 L. Ed. 1295 at 1315, 66 S. Ct. 1029, and say: The decision of the trial court illustrates the danger of confusing a false charge of criminal or disgraceful conduct with concern over a court's dignity.

We respectfully submit that the Complaint does not state a cause of action, and could not be made to state a cause of action, and that the proof does not support the judgment and verdict.

There Is No Proof to Support the Verdict and Judgment for Ten Thousand Dollars Compensatory Damages.

The jury returned a verdict for \$10,000 compensatory damages under a general allegation of damages [R. 19], the allegation of special damage flowing from the loss of the election [R. 17-18] having been abandoned.

The law in Nevada is settled that special damage must be alleged and proved to sustain a cause of action for defamation based on a publication which is not libelous *per se*, *Talbert v. Mack*, 41 Nev. 245, 169 Pac. 25; and that in the absence of such proof, only nominal damages may be recovered, *Thompson v. Powning*, 15 Nev. 195. A charge that a candidate for judicial office is not impartial and entertains an admitted bias in favor of a special interest group is not libelous *per se*. (*Otero v. Ewing*, 115 So. 633, 165 La. 398.)

Further, plaintiff admitted that the injuries he attempted to describe flowed from the loss of the election, as well as from the publication. The causal connection between the mortification and humiliation he claims to have suffered, and the publication itself, is tenuous indeed [R. 134-135]. And damages flowing from the loss of an election are too uncertain and speculative to be considered. (*Otero v. Ewing, supra.*)

There Is No Evidence of Express Malice to Support the Verdict and Judgment for Fifteen Thousand Dollars Punitive Damages.

Punitive damages may not be awarded except upon proof of express malice, that is, the defendants must have been actuated by a feeling of spite, or ill-will, or malevolence, or the wrongful action must have been so grossly negligent, so wanton, as to import a willingness on the part of the defendants to injure others. (*Nevada State Journal Publishing Co. v. Henderson*, 294 Fed. 60; Instruction No. 8) [R. 81].

Here no effort whatsoever was made to prove express malice. In fact, the only testimony in the record bearing on the question of express malice negatives such malice [Testimony of defendant A. E. Cahlan, R. 177]. Hence, the jury's award of punitive damages is contrary to the law and the instructions of the Court.

The Trial Court Erred in Admitting in Evidence the 1946 and 1950 Election Returns, to Appellants' Prejudice.

In our specification of error on this point, we have set forth verbatim the full substance of the evidence admitted or rejected and the grounds urged.

Damages flowing from the loss of an election cannot be considered because they are too speculative and uncertain. (*Otero v. Ewing, supra.*) As the Court in the *Otero* case said:

"It is as impossible to say after an election what matters and considerations influenced the voters as it is to correctly divine beforehand how an election will go."

True, the offer was "limited" to the purpose of showing the effect of the advertisement upon the people of Clark County [R. 179, 110]. But the limitation is meaningless. If the causal relationship between an alleged libelous publication and the loss of an election is too remote and speculative because it is impossible to divine what influences affect voters in the privacy of the polling booth, *a fortiori*, the returns are inadmissible to exhibit a change in the attitude of the people toward the subject of the advertisement.

And in view of the dearth of evidence of damage or injury flowing from the advertisement, and the exorbitant verdict returned, it cannot conscientiously be said that the evidence of the election returns, highlighted as it was, did not prejudice the Appellants.

Conclusion.

For the reasons stated herein, Appellants respectfully submit a decree should issue, setting aside and reversing the verdict of the jury and the judgment of the lower court entered pursuant thereto.

MILTON W. KEEFER,

W. HOWARD GRAY,

BRUCE R. THOMPSON,

*Attorneys for Appellants Citizens Committee,
Incorporated, Southern Nevada Chapter.*

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*Attorneys for Appellants A. E. Cahlan and
Southwestern Publishing Co., Inc.*

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING Co., Inc., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE INCORPORATED,
SOUTHERN NEVADA CHAPTER, a corporation,
Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLEE'S ANSWERING BRIEF.

RUDIAK, HORSEY & LIONEL,
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Byington Building,
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Attorneys for Appellee.

FILED

OCT 13 1955

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of the case.....	1
Argument	4
Appellee's answer to appellants' contention that the action of the jury in assessing damages, and the trial judge in denying appellants' motion for new trial resulted in an infringement of freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States	4
Appellee's answer to appellants' contention that the complaint does not set forth, and the evidence does not establish, a libelous publication	6
Appellee's answer to appellants' contention that there is no proof to support the verdict and judgment for ten thousand dollars compensatory damages.....	25
Appellee's answer to appellants' contention that there is no evidence of express malice to support the verdict and judgment for fifteen thousand dollars punitive damages.....	34
Appellee's answer to appellants' contention that the trial court erred in admitting in evidence the 1946 and 1950 Clark County election returns to appellants' prejudice.....	39
Conclusion	46

TABLE OF AUTHORITIES CITED

CASES	PAGE
Baldwin et al. v. Warwick, 213 F. 2d 485.....	26
Bank of America Nat. Trust & Sav. Ass'n v. Com. of Int. Rev., 126 F. 2d 48.....	5, 9
Bank of Italy v. Romeo, 287 Fed. 5.....	10
Bastine v. Atlantic Coast Line R. Co., 205 F. 2d 457.....	10
Black, Sivalls & Bryson v. Shondell, 174 F. 2d 587.....	7, 10
Bradley Min. Co. v. Boice, 194 F. 2d 80.....	26
Brooks v. Woods, 181 F. 2d 717.....	5, 9
Caldwell v. Crowell-Collier Pub. Co., 161 F. 2d 333....	6, 16, 19, 23
Charles v. Norfolk and W. Ry. Co., 188 F. 2d 691.....	10
Cobb v. Lepisto, 6 F. 2d 128.....	25, 26
Cook v. East Shore Newspapers, Inc., 327 Ill. App. 559, 64 N. E. 2d 75.....	6, 32, 38
Department of Water and Power of City of Los Angeles v. Anderson, 95 F. 2d 577.....	26
Estelle v. Daily News Pub. Co., et al., 101 Neb. 610, 164 N. W. 558	30, 31
Gaffney v. Scott Pub. Co., 212 P. 2d 817.....	23
Galveston Tribune v. Johnson, 141 S. W. 302.....	40
Graves, In re, 221 Pac. 411.....	14, 15
Hecht v. Alfaro, 10 F. 2d 464.....	10
Houston Printing Co. v. Hunter, 105 S. W. 2d 312.....	41, 42, 45
Howser v. Pearson, 96 Fed. Supp. 936.....	20
Landsberg v. S. F. & P. S. S. Co., 288 Fed. 561.....	10
Liquid Veneer Corporation v. Smuckler, 90 F. 2d 196.....	25, 27, 36
Mattox v. News Syndicate Co., 176 F. 2d 897.....	32, 40, 44

Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 84 L. Ed. 774.....	8
Nevada State Journal Pub. Co. et al. v. Henderson, 294 Fed. 60	20, 36
New York Life Ins. Co. v. Doerksen, 75 F. 2d 96.....	10
Nock v. Fidelity & Deposit Co., 175 S. C. 188, 178 S. E. 839....	45
Otero v. Ewing, 115 So. 633, 165 La. 398.....	33, 39, 40, 42, 43
Pennsylvania Casualty Co. v. Whiteway, 210 F. 2d 782.....	10
Phillips v. Baker, 121 F. 2d 752.....	8
Reynolds v. Pegler, et al., 223 F. 2d 429.....	11, 35, 38
Sacramento Suburban Fruit Lands Co. v. Elm, 29 F. 2d 233.....	9
Scott v. Times-Mirror Co., 181 Cal. 345, 184 Pac. 672.....	31, 32, 35, 44
Sharples Separator Co. v. Skinner, 251 Fed. 25.....	10
Southern Pacific Co. v. Guthrie, 180 F. 2d 295, 186 F. 2d 966	26, 32
Southern Pacific Co. v. Zehnle, 163 F. 2d 453.....	26, 27
Steil v. Holland, 3 F. 2d 776.....	10
Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555.....	10
Talbot v. Mack, 41 Nev. 245, 169 Pac. 25.....	11, 12, 17
Terry v. United States Fidelity & Guaranty Co., 82 P. 2d 532....	43
Washington Post Co. v. O'Donnell, 43 App. D. C. 215; cert. den., 238 U. S. 625, 59 L. Ed. 1495.....	44
Western Nat. Ins. Co. v. Le Clare, 163 F. 2d 337.....	5, 9
Westropp v. E. W. Scripps, et al., 74 N. E. 2d 340.....	20
Whitcomb v. Hearst Corp., 107 N. E. 2d 295.....	33
Williams v. Dodds, 163 F. 2d 724.....	5, 9

RULES	PAGE
Federal Rules of Civil Procedure, Rule 12(h).....	7, 8, 10
Federal Rules of Civil Procedure, Rule 50.....	10
Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17(6)	4

TEXTBOOKS

33 American Jurisprudence, Sec. 5.....	40
33 American Jurisprudence, Sec. 200.....	40
33 American Jurisprudence, Sec. 282.....	40
Restatement of the Law of Torts, Sec. 573.....	13
Restatement of the Law of Torts, Sec. 569(e).....	13

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING Co., INC., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE INCOR-
PORATED, SOUTHERN NEVADA CHAPTER, a corporation,
Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLEE'S ANSWERING BRIEF.

Statement of Jurisdiction.

Appellee concurs with the Statement of Jurisdiction
set forth on pages (1) and (2) of Appellants' Brief.

Statement of Case.

In October of 1950, Appellee occupied the office of
Chief Justice of the Supreme Court of the State of
Nevada. He was also, at that time, a candidate to suc-
ceed himself as a member of said Court. In the latter
part of that month and year Appellee had occasion to

call upon one Paul K. Gardner, the publisher, of a weekly newspaper called the Lovelock Review-Miner [R. 115]. After the formalities of introductions were completed, Mr. Gardner asked Appellee, "Are you pro-labor?" to which Appellee replied "Yes, I have always been for labor" [R. 115]. Appellee immediately, and in great detail, proceeded to explain to Mr. Gardner what he meant by that statement and specifically informed Mr. Gardner that his oath of office and position on the Bench precluded him from being influenced at all by any personal or political sympathies for the working man and that his decisions were based entirely on accepted and sound judicial precedents as established by our State and Federal Courts. The conversation consumed a period of time of at least one-half hour [R. 115-120]. Appellee's conversation with Mr. Gardner was held in the presence of Charles Lee Horsey, Jr., who fully and completely corroborated Appellee as to his statements made during the course of the conversation [R. 137-140].

On October 26, 1950, an editorial appeared in the Lovelock Review-Miner under the by-line of Paul K. Gardner [Deft. Ex. A; R. 170].

Appellee takes issue with Appellants' statement on page (4) of their Brief wherein they state that Appellee read the Gardner editorial in the Lovelock Review-Miner during the campaign and did nothing about it. Appellee testified that he had seen some papers from around the State, but he was not certain whether the Lovelock Review-Miner was one of those or not, and that if it were he merely glanced at it [R. 131], and that he did not see the advertisement in the Las Vegas Review-Journal until after the election [R. 121]. Charles Lee Horsey, Jr.,

who accompanied the Appellee on the latter's campaign trip and who was with Appellee when he picked up some newspapers from a newsstand at Fallon [R. 132], testified that he did not see the Lovelock Review-Miner until after the election [R. 140] and the advertisement in the Las Vegas Review-Journal on the day of election [R. 140].

On Sunday, the 5th day of November, 1950, two days before the general election of November 7, 1950, the Appellants published and caused to be published in the Las Vegas Review-Journal, a daily newspaper owned and published by the Southwestern Publishing Co., Inc., at Las Vegas, Clark County, Nevada, a paid political advertisement occupying nearly a full page of said issue. Said advertisement reprinted the Gardner editorial and greatly embellished same and in the embellishment lower-cased all of the letters in Appellee's name [R. 10-13; Pltf. Ex. 3; R. 112].

On July 22, 1952, Appellee filed an action for damages based upon the advertisement appearing in the Las Vegas Review-Journal [R. 3-20]. After a trial was had which resulted in a verdict and judgment for Appellee, and upon the granting of Appellee's motion for a new trial, based upon the ground of inadequacy of damages, a second trial ensued resulting in an award by the jury of \$10,000.00 compensatory, and \$15,000.00 punitive, damages [R. 182]. Appellants filed a motion for new trial [R. 91-92] and upon the hearing thereof same was denied [R. 95-96].

ARGUMENT.

Appellee's Answer to Appellants' Contention That the Action of the Jury in Assessing Damages, and the Trial Judge in Denying Appellants' Motion for New Trial Resulted in an Infringement of Freedom of Speech Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Appellants have asserted, commencing on page (9) of their Brief, that the action of the jury in assessing damages in this case, and the trial judge in permitting the verdict to stand, has resulted in an infringement of the Freedom of Speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. An examination of the Record discloses that this contention is being asserted for the first time. Neither in their Motion for New Trial [R. 91-92], nor in their Statement of Points [R. 183-184], nor in their Specification of Errors (pp. 6-8 of Br.), have Appellants advanced this proposition. Appellee respectfully submits that they cannot now do so.

Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, states as follows:

“In all cases, including those on petition for review to enforce or to set aside an order of a United States Board or Commission, the appellant or petitioner, upon the filing of the record in this Court, shall file with the clerk a concise statement of the points on which he intends to rely. With such statement the appellant or petitioner shall file a designation of all the record which is material to the consideration of the appeal or review and forthwith serve on the adverse party a copy of the statement and designation. The adverse party, within 10 days thereafter.

may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and if he shall not do so, he shall be held to have consented to a hearing on the parts designated. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only: *and the Court will consider nothing but those parts of the record and the points so stated.* If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed, or such other order made as the circumstances may appear to the Court to require. If the appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the Court shall think proper.

“All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record as well as the documents to be printed or omitted.” (Emphasis supplied.)

This Honorable Court has had occasion to consider the above-quoted rule in a number of cases (when the rule number was 19(6)) and has declined to consider matters not set forth in the Statement of Points, in each case.

Brooks v. Woods, 181 F. 2d 717, 718;

Bank of America Nat. Trust & Savings Ass'n v. Commissioner of Internal Revenue, 126 F. 2d 48, 52;

Williams v. Dodds, 163 F. 2d 724, 725;

Western Nat. Ins. Co. v. Le Clare, 163 F. 2d 337, 340.

The decisions of this Honorable Court in the above-named cases leads to no other conclusion, it is submitted, than that Appellants may not now raise for the first time their contention that the action of the judge and jury in the instant case manifests an infringement upon the Freedom of Speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

That the freedoms protected by the First and Fourteenth Amendments to the Constitution of the United States are limited and restricted by the law of libel and slander is too well established to be seriously questioned (*Caldwell v. Crowell-Collier Pub. Co.*, 161 F. 2d 333, 336.) See also, *Cook v. East Shore Newspaper, Inc., et al.*, 327 Ill. App. 559, 64 N. E. 2d 75, where the very contention asserted by Appellants herein was rejected by the Illinois Court. In fact, Appellants admit to such limitations on pages (9) and (11) of their Brief. It is apparent, therefore, that Appellants are begging the question in advancing the proposition herein suggested. The determination of this appeal must be guided by the law of libel and the law as established by this Court relative to appeals in general.

Appellee's Answer to Appellants' Contention That the Complaint Does Not Set Forth, and the Evidence Does Not Establish, a Libelous Publication.

Appellants have asserted, commencing on page (11) of their Brief that Appellee's complaint does not state a cause of action in that the publication complained of was not libelous, and that the proof does not support a judgment and verdict in favor of Appellee for the

same reason. An examination of the record discloses that Appellants did not in their answer [R. 33-51] or during the trial of the cause [R. 103-182] or at any other time, raise the question of the failure to state a claim.

Rule 12(h) of the Rules of Civil Procedure reads as follows:

“(h) Waiver of defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. The objection or defense, if made at the trial shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.”

Appellee contends that Appellants have waived the defense of failure to state a claim by not presenting same either by motion to dismiss, or in their answer, or at the time of trial.

In the case of *Black, Sivalls & Bryson v. Shondell*, 174 F. 2d 587, 590, the Court stated:

“ . . . Under Rule 12, Rules of Civil Procedure 28 U. S. C. A., a defendant waives all defenses and objections which he does not present either by motion or in his answer except that the defense of failure to state a claim upon which relief may be granted

may also be made by a later pleading if one is permitted or by motion for judgment on the pleadings or at the trial on the merits. *The record shows no such defense presented by defendant in a motion or answer and it must be deemed to have waived the defense that the petition did not state a claim upon which relief may be granted.* The motion which defendant made for judgment notwithstanding the verdict was on the grounds that 'the plaintiff's petition and the evidence discloses that there was no privity of contract between the plaintiff and the defendant' and that 'it was uncontroverted in the evidence that the five tanks delivered by defendant complied with the terms specified in the (written) order' given by Midwest to defendant. *It was made after the trial and did not preserve the defense of failure of the petition to state a claim. The defendant is therefore in the position of having waived that defense and may not urge it here.*" (Emphasis supplied.)

To the same effect is a decision of this Honorable Court is the case of *Phillips v. Baker*, 121 F. 2d 752, 755, wherein the Court stated in referring to Rule 12 (h) of the Rules of Civil Procedure:

" . . . Evidently, the paragraph was intended to provide that any defense permitted to be made by motion at the option of the defendant, and which is not raised *either* by motion *or* by the answer, will be deemed to have been waived. The Courts have so construed that rule."

Similarly, the United States Supreme Court in the case of *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 84 L. Ed. 774, 60 S. Ct. 517 would not consider the defense of failure to state a claim where said defense was not timely and properly made.

Appellee respectfully submits that Appellants are precluded from asserting that the complaint fails to state a claim upon which relief can be granted for the further reason that they have not included this contention in their Statement of Points and must be deemed to have waived it [R. 183].

Brooks v. Woods, supra;

Bank of America Nat. Trust & Savings Assn. v. Commissioner of Internal Revenue, supra;

Williams v. Dodds, supra;

Western Nat. Ins. Co. v. Le Clare, supra.

Appellants also contend that the evidence does not establish a libelous publication and therefore does not support a judgment in Appellee's favor. It will be noted here in examination of the record that at no time during the course of the trial did Appellants question the sufficiency of the evidence by a motion for directed verdict, as provided for in Rule 50 of the Rules of Civil Procedure, or otherwise. Having failed to do so, Appellants are now precluded from questioning the sufficiency of the evidence to support a verdict in favor of Appellee. In the case of *Sacramento Suburban Fruit Lands Co. v. Elm*, 29 F. 2d 233, 235, this Honorable Court stated:

“The contention that the evidence was not sufficient to sustain the verdict and judgment requires no detailed examination, for the reason that defendant made no motion for an instructed verdict in its favor; nor did it object in any way to the action of the Court in submitting the issues to the jury. Under that situation this Court ordinarily, will not review the sufficiency of the evidence to support the verdict.” (Citing cases.)

The above holding is reflected in other decisions of this Court:

Hecht v. Alfaro, 10 F. 2d 464, 466;

Steil v. Holland, 3 F. 2d 776;

Bank of Italy v. Romeo, 287 Fed. 5;

Penn Casualty Co. v. Whiteway, 210 Fed. 782;

Landsberg v. S. F. & P. S. S. Co., 288 Fed. 561;

Sharples Separator Co. v. Skinner, 251 Fed. 25.

Abundant authority exists in the other circuits to the same effect:

Bastine v. Atlantic Coast Line R. Co. (5th Cir.),
205 F. 2d 457;

Charles v. Norfolk & W. Ry. Co. (7th Cir.), 188
F. 2d 691;

Strika v. Netherlands Ministry of Traffic (2d Cir.),
185 F. 2d 555;

Black, Sivalls & Bryson, Inc. v. Shondell, *supra*
(8th Cir.);

New York Life Ins. Co. v. Doerksen (10th Cir.),
75 F. 2d 96.

In light of the foregoing authorities, Appellee respectfully submits that Appellants are precluded from asserting on appeal that the complaint fails to state a claim, for the reason that said defense was not raised by motion, or in the answer or at the time of trial as required by Rule 12(h) of the Rule of Civil Procedure; and are precluded from questioning the sufficiency of the evidence to support the verdict in Appellee's favor for the reason that Appellants did not preserve said question by making a motion for directed verdict, as required by Rule 50 of the Rules of

Civil Procedure, at the close of the evidence and before submission of the cause to the jury. But even if the law on this point were otherwise and contrary to what the Courts have held it to be, Appellee contends that the complaint in this action does state a claim and that there was ample evidence warranting a verdict in Appellee's favor.

Inasmuch as federal jurisdiction in this case is based upon diversity of citizenship and the publication complained of was published in the State of Nevada, the substantive aspect of the case is governed by Nevada law. (*Reynolds v. Pegler, et al.*, 223 F. 2d 429.) Libel *Per se* has been defined by the Nevada Supreme Court in the case of *Talbot v. Mack*, 41 Nev. 245, 169 Pac. 25, and is expressive of the common law. On page 30 of the Pacific Reporter citation the Court stated:

"It is true that any false and malicious writing published of another is libelous *per se* when its tendency is to render the party contemptible or ridiculous in public estimation or expose him to public hatred or contempt. (Cooley on Torts, p. 401.) Words or expressions that tend to lower a man in the estimation of his acquaintances or detract from the confidence of his neighbors that he has enjoyed have in some instances been held to be libelous *per se*; . . ."

And on page 32 is found the following statement:

"Viewing the question from another angle, we think a rule applicable to the subject may well be stated thus: Words are actionable *per se* which directly tend to the prejudice of any one in his office, profession, trade or business . . ."

Finally, in summation, the Court made the following observation on page 34:

“Many other cases of like significance might be referred to as signifying what courts have held to be language libelous *per se*. None of them are analogous to the case at bar. In each of the cases to which we have last referred, language is used designating a given person with reasonable certainty and terms or assertions are resorted to in the libelous utterance imputing attributes which, with reference to the person, either by reason of the common use made of the term within the locality or the acceptance of the term or assertion generally, would naturally tend to degrade him in the estimation of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business, occupation, or profession.”

Turning to the publication in question here [Pltf. Ex. 3, R. 10-13], we find the statements contained therein come squarely within the definition of libel *per se* as defined by the Nevada Court. At the outset of the publication there is a direct charge that Appellee was a labor racketeer by his own admission. After quoting the alleged conversation Editor Gardner proceeded to define “pro-labor” and by substituting his definition for that term no other conclusion can be reached but that Appellee was a labor racketeer. Clearly, the labeling of Appellee a “labor racketeer” would come within the definition of libel *per se* as defined by Nevada Supreme Court in the *Talbot* case. Of course, Mr. Gardner did not stop with that charge. He proceeded to impute improper motives to Appellee when he charged that Appellee was motivated in his decision of a specific case before him, to-wit, the

White Cross Drug Co. case, by a prejudice in favor of labor racketeers, rather than by a conscientious application of the law to the facts. Can there be anything worse, as far as a judge is concerned, than to be falsely charged with being prejudiced, in a particular case, in favor of labor racketeers or anyone else. The very concept and essence of justice demands that impartiality and fairness be the prime moral ingredients necessary to proper judicial temperament and to falsely charge a judge with the lack of these qualities by charging their opposites is to directly impugn his character by attacking his integrity and honesty. There could be no difference in falsely charging a clergyman as being agnostic. Such characterizations would be incompatible with the proper conduct of their professions.

The American Law Institute in its Restatement of the Law of Torts recognizes the impropriety of imputing bad motives to a public official. Section 573 of that publication states:

“One who falsely and without privilege to do so, publishes a slander which ascribes to another conduct, characteristics, or a condition *incompatible* with the proper conduct of his lawful business, trade, profession, *or of his public office*, whether honorary or for profit, is liable to the other.” (Emphasis supplied.)

Section 569 (e) states that the same rule is applicable to a libel.

That to charge a Judge with being partial to certain interests in specific litigation before him as being libel-

ous *per se* is aptly demonstrated in the case of *In re Graves*, 221 Pac. 411. In this case an attorney sent out circulars through the mails attacking the official and personal acts and conduct of one Judge Monroe. One of the charges made was as follows:

“ ‘In *Metcalf v. Pacific Electric Railway No. B-87332*, Judge Monroe refused to set aside a verdict in favor of the defendant and grant a new trial, which judgment had been entered by mistake on a verdict to which only eight jurors agreed. See affidavits in the office of the clerk of the Superior Court.

“ ‘*Query: Would he set it aside if the judgment had been for the plaintiffs. The answer is, that he has never failed to set aside a judgment against a railroad; if the slightest flaw could be found in any stage of the proceedings.*’ ”

The California Court in commenting on this charge of partiality stated, commencing at page 412:

“It is unnecessary here to attempt the establishment of limitations within which one may be confined in casting aspersion upon an incumbent of the judiciary during a heated campaign for re-election. Judge Monroe was not running for office, and no such occasion was presented. However, there are such limitations, and these questions have been settled by the Supreme Courts of this and most of the other states. In the matter of *Humphrey*, 174 Cal. 290, 163 Pac. 60, it is declared that even though the subject of attack was at the time a candidate for re-election to judicial office, an attorney at law was not privileged to falsely accuse the magistrate of acts amounting to a misuse of his office. It must be remembered and recognized that the language alleged to have been used by appellant contained charges of specific conduct which, if warranted by the facts,

would amount to abuse of official authority. We have in these accusations not a criticism in the way of fair comment, nor of expression of opinion, but definite charges amounting to misuse of office. Such charges can only be justified by proof of their truth; *if they were untrue their publication constituted libel*, and for an attorney to libel a judge concerning his official acts is certainly ground for suspension or disbarment.” (Citing cases.) (Emphasis supplied.)

While the *Graves* case was concerned primarily with disbarment proceedings of an attorney, the Court clearly held that to impute improper motives to a judge as to specific litigation before him is libel *per se* and being such a finding of moral turpitude was warranted to substantiate disbarment or disciplinary action.

On page 13 of their Brief Appellants state that the conversation between the Appellee and Paul K. Gardner was correctly reported according to unanimous testimony. No greater inaccuracy could ever be suggested. Not only does the testimony of Appellee [R. 115-117, 132-133] and Charles Lee Horsey, Jr. [R. 137-140] refute such a statement, but Appellants’ own witness, editor Gardner, admitted more was said than he printed when he testified that Appellee in answer to Gardner’s question as to whether he was pro-labor stated “I admit that I am pro-labor. The decisions of the Nevada Supreme Court are pro-labor. Therefore I am pro-labor” [R. 168], and a further statement by Gardner concerning whether the Supreme Court changed its decisions. Also, Gardner admitted that much of the conversation testified to could have taken place [R. 160] and that he remembered part of the conversation, certainly implying that there was more to the

conversation than he printed [R. 158]. So, under the guise of the truth, Appellants attempt to relieve themselves from liability by the vicious weapon of the "half-truth."

A somewhat similar situation took place in the case of *Caldwell v. Crowell-Collier Pub. Co.*, *supra*. In that case the complaint alleged that a negro boy under indictment for rape had been snatched from jail and shot. Governor Caldwell of Florida wrote a lengthy letter to Colliers in which he stated that he didn't consider the killing to be a lynching inasmuch as there was no evidence of mob action and that he considered it to be murder. He went into great detail as to the investigation he had conducted, the results of which established beyond doubt in his mind that the killing was a murder and not a lynching. He also expressed concern in cases of this nature of young children being brought into Court and being subjected to the ordeal of cross-examination. He concluded that he was making a determined effort to awaken the citizens of the Counties to feel responsible for the officials they elect, for, although the Sheriff of the particular county wherein the killing took place was not personally involved, his stupidity and ineptitude had shown his unfitness for office. The complaint further alleged that Colliers published an article in which it stated that Gov. Caldwell did not consider the killing a lynching. No mention was made of the Governor's investigation, or his concern over the circumstances surrounding the killing, or his statement that he considered the killing a murder. The publication went on to say that Caldwell opined that the mob had saved the Courts considerable trouble and then quoted that portion of the letter relating to the ordeal of children appearing in Court as prosecuting witnesses.

The trial court dismissed the petition upon the ground that there was no libel *per se* alleged and inasmuch as no special damages were claimed the action must fail. In reversing the trial court, the Court of Appeals for the Fifth Circuit stated, commencing at page 335:

“We think a case of libel is alleged. Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law States. A libel is a compound of written falsity and malicious publication, but the falsity may consist in untrue imputation as well as direct statement, and malice may be inferred from the nature of the charges made as well as from the circumstances. False imputations may be actionable *per se*, that is in themselves, or *per quod*, that is on allegation and proof of special damage. (33 Am. Jur., Libel and Slander, §5 (citing cases).) No special monetary or other damage is here alleged, so the question is, are the false imputations libelous *per se*? Imputation of a crime is not present. But it is enough, if the natural or necessary result of the imputation is to hold one up to public hatred, contempt or ridicule, 33 Am. Jur., Libel and Slander, §45; or to prejudice him in his profession, office, occupation, or employment *Id.* §63, and more particularly in his public office, §79”

The Court went on to define libel *per se*, quoting same from a Florida case which was identical to that given by the Nevada Court in *Talbot v. Mack*, *supra*. The Court then outlined the duties and responsibilities of the Governor under the Constitution of the State of Florida, his

oath of office, and punishments provided by law for misconduct in office.

Referring to the distortion of the Collier publication, the Court stated at page 336:

“We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. *One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion if the meaning is plain. (33 Am. Jur., Libel and Slander, §9.) A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated and implied in the editorial.*” (Emphasis supplied.)

In commenting upon the defense of qualified privilege the Court had this to say:

“More broadly it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even

vituperated, *but the facts cannot be perverted with impunity.* Several of the Florida cases above cited were between public officers and newspapers. An earlier one is *Jones, Varnum & Co. v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676. See also *Nevada State Journal Co. v. Henderson*, 9 Cir., 294 F. 60. *But we need not at present further discuss this asserted privilege, because the complaint alleges malice in fact, and privilege is never an effective cloak for malice.*" (Citing cases.) (Emphasis supplied.)

In applying the principles announced by the Fifth Circuit in the *Caldwell* case to the case at bar, it is clear that the complaint in this action stated a valid claim. Here we have a complete distortion of a conversation between Appellee and Mr. Gardner to impute improper motives on the part of Appellee in rendering a decision in a specific case before him by implying that he arrived at such decision because of a prejudice for labor racketeers, as well as a direct charge that Appellee was a labor racketeer. And in holding that the complaint stated a claim upon which relief could be granted, which we are concerned with in this point, the Court of Appeals for the Fifth Circuit observed that it wasn't concerned with qualified privilege or fair comment as the complaint alleged malice just as the complaint here so alleged [R. 9-16]. Appellee can't help but feel that Appellants recognize the complaint as being one which stated a valid claim, and the evidence sufficient to establish a libelous publication, for they didn't question the sufficiency of the complaint by filing a motion to dismiss, or raising the matter as a defense in their answer, or by doing so during the trial either by a motion to dismiss or by a motion for directed verdict to attack the sufficiency of the evidence to establish a libelous publication.

It seems clear, therefore, that Appellee's complaint satisfied all the requirements necessary to state a valid claim so as to satisfactorily answer Appellants' assertion raised in this point and that Appellee's allegation of malice in his complaint dispenses with the matter of qualified privilege or fair comment as far as the sufficiency of the complaint is concerned. But let us examine the legal principles relative to the defense of fair comment to determine if, in other respects, such a defense was available to Appellants at the trial of this action.

It is a well settled principle of law, prevalent in an overwhelming majority of jurisdictions in this country, that a defendant in order to avail himself of the defense of qualified privilege or fair comment must establish (1) that his comment was based on true statements of fact, (2) that his comments were free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and (3) that his publication was made in good faith and without malice. Such is the law in Nevada.

Nevada State Journal Pub. Co., et al. v. Henderson,
294 Fed. 60;

Howser v. Pearson, 96 Fed. Supp. 936.

In *Westropp v. E. W. Scripps Co., et al.*, 74 N. E. 2d 340, 345, the Ohio Supreme Court had occasion to fully discuss the requisite elements of the defense of fair comment. In its opinion, commencing at page 345, the Court had this to say:

"Still more pertinent to the instant case is the rule applicable to public officers, as stated in 33 American Jurisprudence 92, Section 79, as follows: 'It is libel-our *per se* to impute to a person in his character as a public officer incapacity or any kind of fraud, dis-

honesty, misconduct, or a want of integrity, or to charge that he has been induced to act in his official capacity by a pecuniary or other improper consideration.'

"Did the trial court err in rejecting the requested charge hereinbefore quoted and thereby refusing to direct the jury that the written publication complained of was libelous *per se*? In the opinion of the majority of the courts, the language of the publication clearly charged that the plaintiff as judge of the Municipal Court of Cleveland, not only granted to the defendant in the criminal case a continuance of his case, upon his application, but also that in so doing the plaintiff was motivated by the intercession of such defendant's politically powerful friends and by lawyers for underworld figures, who had influence and knew how to manipulate matters to obtain delays, and further that by granting the continuance to such defendant, plaintiff thereby afforded him an opportunity to commit murder and by reason thereof the blood of the victim was on the plaintiff.

"The action of the plaintiff thus charged by the publication was misconduct, in the performance of official duty, induced 'by a pecuniary or other improper consideration' and such as to constitute misfeasance, if not malfeasance in office. It is well settled that a publication of such character is libelous *per se*.

"The record shows an admission that at the time of the publication complained of defendant knew that the plaintiff had not granted to the defendant in the criminal case a continuance of his case, and that the plaintiff's only connection with the case was to grant the application of the prosecution for a continuance. The record further discloses that such application was made in open court and was granted upon the

insistence of the prosecution on behalf of the state that by reason of the absence of material witnesses, the arresting officers, proof essential to support the charge was not then available. As disclosed by the cases annotated in 110 A. L. R. 412, the majority rule is: 'In the majority of jurisdictions the rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, *does not apply to false statements of fact*. In these jurisdictions, a defamatory statement of fact concerning one in public life, or who is a candidate for office, if false, is as actionable as would be such a statement concerning one in private life.' Cases from many jurisdictions, including Ohio, are cited in support of that rule.

"The minority rule as indicated is that 'the privilege extends to misstatements of fact in a publication or communication relating to the public officer, or a candidate for office, if the other conditions of qualified privilege exist.' It is there disclosed, however, that even under the minority rule, it must appear that the publication was made in good faith and without malice.

"In stating the general rule with reference to privilege it is said in 36 Corpus Juris 1283, Section 389: '*What is privileged, if that is the proper term, is the criticism or comment, not the statement of facts on which it is based. Generally speaking, comment or criticism must be founded on truth.* While ordinarily it does not consist of the assertion of facts, an allegation of fact may be justified by its being an inference from other facts truly stated. The right to comment or criticize does not extend to, or justify, allegations of fact of a defamatory character. If the publication is not comment or criticism, but a state-

ment of fact, the rules to be applied to the nature of recovery are those applicable to any other case of defamation; if defamatory and false, it is actionable, although made in good faith, without malice, and under the honest belief that it is true.' *No untruth can be the basis of fair criticism, and the expression of an opinion which carries with it imputation of wrongdoing is as much libelous as a direct charge of wrongdoing. The statements of fact commented on must be true if the defense of fair comment and criticism is to be available. See Jones on the Law of Journalism, 99, Section 35.*"

Does the publication here in question meet the requisites of fair comment? Obviously, Appellant respectfully submits it does not. In the first place, as we have seen from the application of the principles of the *Caldwell* case, *supra*, a distortion of a statement of a person or the taking of words out of context so as to convey a totally different impression from that intended, it not a true statement of fact upon which to base a comment. Secondly, the publication charged Appellee with conduct of a criminal nature by labeling him a labor racketeer, (This imputation was not warranted even if the conversation as reported by Mr. Gardner was completely accurate, for a person could certainly be pro-labor without being a labor racketeer.) and in imputing misconduct in office in that a decision rendered by Appellee was based solely on a bias and prejudice in favor of labor racketeers.

In commenting on such limitations of privilege, the Washington Supreme Court in *Gaffney v. Scott Pub. Co.*, 212 P. 2d 817, observed:

"The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials, but in the exercise of such privileges

a publication which imputes to them charges of misconduct in office, want of official integrity or fidelity to public trust, if false, is a violation of that privilege and gives rise to an action for damages.” (Emphasis supplied.)

Finally, as will be more fully argued in a later part of this Brief, the publication was made maliciously and this factor alone would defeat any other right appellants might have to assert the defense of fair comment although, as we have seen in a majority of jurisdictions, such malice is not necessary when a comment is based on misstatement of facts as is the situation here.

In summation, Appellee respectfully submits that Appellants are precluded from asserting for the first time on appeal that the complaint fails to state a claim or to assert that the evidence is insufficient to warrant a verdict for Appellee, by reason of their failure to make proper and timely objections; that even if such assertion could be made Appellee's complaint does state a claim upon which relief can be granted and the evidence was sufficient to warrant a finding by the jury in Appellee's favor; and finally the defense of fair comment is not available to Appellants by reason of the fact that such comment was based upon misstatement of facts, and improperly charged Appellee with improper and dishonorable motives and, as will be shown later, was made maliciously.

Appellee's Answer to Appellants' Contention That There Is No Proof to Support the Verdict and Judgment for Ten Thousand Dollars Compensatory Damages.

Although Appellants have, on page 14 of their Brief, advanced the contention that there is no proof to support the verdict and judgment for Ten Thousand Dollars compensatory damages, their argument asserts that there is no proof to sustain an award of compensatory damages at all. To this, Appellee respectfully refers this Honorable Court to his argument heretofore made in this Brief with reference to the question of the sufficiency of the evidence and suggests that Appellants by their failure to move for a directed verdict during the trial cannot now urge that there was a total failure of proof and no damages should have been awarded to Appellee. If Appellants concede that a finding for Appellee may have been proper but that there is insufficient evidence to substantiate the amount awarded Appellee as and for compensatory damages, then a discussion upon the power of a federal appellate court to review the question of excessiveness of damages, and an examination of the evidence, appears to be warranted. In either event, however, the result is the same.

The question of appellate review of a trial jury award of damages has been presented to this Court on several occasions.

Cobb v. Lepisto, 6 F. 2d 128;

Liquid Veneer Corporation v. Smuckler, 90 F. 2d 196;

Department of Water and Power of City of Los Angeles v. Anderson, 95 F. 2d 577;

Southern Pac. Co. v. Zehnle, 163 F. 2d 453;

Southern Pac. Co. v. Guthrie, 180 F. 2d 295, 186 F. 2d 926;

Bradley Min. Co. v. Boice, 194 F. 2d 80;

Baldwin, et al. v. Warwick, 213 F. 2d 485.

A study of these authorities reveals an interesting development of the law with reference to this subject. As indicated in the case of *Southern Pac. Co. v. Guthrie*, *supra*, an overwhelming majority of the United States Courts of Appeals and decisions of the United States Supreme Court do not permit the question of excessiveness of damages to be a subject for review by an appellate tribunal. Commencing with *Cobb v. Lepisto*, *supra*, this Honorable Court modified the majority rule somewhat and announced that review may be had if the damages awarded were "grossly excessive" and in the rehearing of the *Guthrie* case, *supra*, this was extended to mean "monstrous."

In the *Guthrie* case, *supra*, the trial jury awarded the plaintiff \$100,000.00 damages and while this court thought the award too high it would not reverse the judgment because this court did not consider the award to be "monstrous." In a slander and false imprisonment case, *Bradley Min. Co. v. Boice*, *supra*, this court, in upholding a \$60,000.00 judgment stated:

"The power of this court in respect of verdicts claimed to be excessive is not coextensive with that of the district court. At most we can consider only whether the verdict is grossly excessive or 'monstrous.' *Southern Pacific Company v. Guthrie*, (9 Cir.), 186 F. 2d 926, 931-933. When the trial

judge is presented, as the judge was here, with a motion for new trial grounded on a claim of excessive verdict, his power to deal with such a claim is not limited as ours is to questions of law. He may set aside a verdict when he thinks it is against the weight of the evidence or for other reasons he deems sufficient. In this instance the judge, familiar with the atmosphere of the trial and sensible of imponderables which might prejudicially affect the action of the jury, was satisfied that their verdict was motivated by the evidence alone and that it was not excessive. On the record before us, certainly, we can not say that he was wrong.”

And in *Liquid Veneer Corporation v. Smuckler, supra*, a libel case, this court upheld an award of \$11,000.00 compensatory and \$9,000.00 punitive damages as not being “unconscionable.”

This Court recognized the limitations on appellate review as to this question in the decision of *Southern Pac. Co. v. Zehnle, supra*, when it stated:

“We recognize, as does the California law, the important part of the trial judge in determining a contention of excessive damages raised as here on motion for a new trial, which was denied. In *Bond v. United Railroads*, 159 Cal. 270, 285, 113 P. 366, 48 L. R. A., N. S., 687, Ann. Cas. 1912C, 50, the California Supreme Court said that the remedy of excessive verdicts ‘is practically committed entirely to the judge who presides at the trial in the Court below’ and that the power of appellate courts over damages ‘exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. See *Hale v. San Bernardino, etc. Co.*, 156 Cal. 713, 716, 106 P. 83;

Wheaton v. North Beach, etc., Co., 36 Cal. 590, 591. Practically, the trial court must bear the whole responsibility in every case.'” (Emphasis supplied.)

Let us now turn to the Record to determine the evidence offered on Appellee's behalf as to his damages and then examine the authorities and compare awards which have been sustained on similar evidence.

The Appellee's testimony establishes that his has been an illustrious career. He commenced public service in the year 1906 when he was first appointed and then elected district attorney of Lincoln County, Nevada, which at that time also embraced what is now known as Clark County. In 1913 he was elected State Senator from Lincoln County and served as Chairman of the Judiciary Committee of that body. He then was elected district judge of the Tenth Judicial District. In 1928 he was the Democratic nominee for Nevada's lone seat in the House of Representatives. He was appointed State Senator from Clark County in 1939 and again assumed the office of District Judge of the Eighth Judicial District in 1945. A short time later he was appointed by the Governor of the State of Nevada to the Nevada Supreme Court to succeed William E. Orr who had been elevated to this Honorable Court. In 1946 he was elected a Justice of the Nevada Supreme Court to fill the unexpired term of Judge Orr. He subsequently became Chief Justice of that Court, a position which he held until January, 1951. During the intervening years between public offices he practiced law and was awarded a certificate as an honorary member of the State Bar of Nevada in 1945 for having served forty years in good standing as a member of the State Bar of Nevada [R. 106-109].

Appellee testified that the publication had such a great effect upon him mentally that it got so that he couldn't talk to everybody that he met; that he began to think they were suspicious of him and considered him more or less a criminal; that he would hate to stop and talk with people because he felt they were suspicious as to his honor and integrity and finally he would avoid situations which required him to meet people; that there were times when he couldn't sleep at all; that he came to Las Vegas and tried to practice law but felt in his own mind that with the tremendous increase in population of Clark County he would have to spend most of his time disabusing the minds of the people of Clark County as to his honor and integrity [R. 122-125]. Appellants would have this Honorable Court believe that the loss of the election caused all of Appellee's mental anguish, but Appellee testified [R. 134] that the drastic effect was the publication assailing his honor and integrity and that he had never had that experience before although he had been a candidate in many elections. Appellee's testimony in this regard was substantiated by Charles Lee Horsey, Jr., who testified that Appellee left his office early every day and that all that was left of Appellee was his body; his spirit and heart was gone [R. 141]. There was also evidence of the wide circulation given to the publication when the court, upon the basis of admissions contained in Appellants' answers, instructed the jury that Appellants admitted to a circulation of 14,000 copies [R. 78], a sizeable distribution for the population of Clark County. And the size of the publication [Pltf. Ex. 3] itself was evidence of the prominence given the matter and the possibility of its being noticed.

In upholding a \$20,000.00 compensatory award (\$10,000.00 against each of two defendants) the Nebraska Supreme Court in *Estelle v. Daily News Pub. Co., et al.*, 101 Neb. 610, 164 N. W. 558, 560, had this to say:

“It is insisted that the verdict is grossly excessive, and a number of instances where verdicts of lessor amounts have been set aside or remittiturs ordered have been cited. The plaintiff in this case was nearly 65 years of age. He had lived in Nebraska since 1872. In 1884 he was elected district attorney for the judicial district in which he lived. He was appointed by the Governor to fill a vacancy as judge of the district court. Afterwards he was elected to the same position, and has held that position constantly since January, 1900. He has been department commander of the Grand Army of the Republic for the district of Nebraska. He was inspector general of the national organization. Between terms of his court work he has served engagements as a lecturer upon the Chautauqua platform. Having occupied these public positions, Judge Estelle has been more or less in the public eye in the State of Nebraska and elsewhere for many years. At the time the libel was printed he was occupying judicial office and was a candidate for re-election. The publication charged him with being associated with ‘the Third ward crowd’ which the proof shows was largely composed of thieves, gamblers, pimps, and ballot-box stuffers. The evidence shows with respect to the ‘Erdman Case’ mentioned in the publication that instead of assisting in a ‘frame-up’ to send Erdman to the penitentiary, which is a fair implication from the published statement, Judge Estelle refused to accept a plea of guilty from Erdman when qualified by the statement that he was not able to fight the county. He appointed counsel for the defense and allowed

compulsory process for witnesses. In a number of other material matters the evidence disproves the imputations and statements of the publication. *The condition and station in life of one injured by a libel may be such as greatly to aggravate the injury, and a jury is entitled to take this into account in fixing the amount of recovery. . . .*" (Emphasis supplied.)

The factual parallel between the *Estelle* case, *supra*, and the case at bar is significant. In fact it would seem in many instances to require only a substitution of Justice Horsey's name for that of Judge Estelle in the Nebraska Court's opinion to have an accurate statement of the facts of this case. But even more significant is the Court's opinion that one's station in life may greatly aggravate the injury done and the jury is entitled to take that factor into consideration in assessing damages.

The question of the degree of proof necessary to sustain an award of substantial damages in a libel action is graphically illustrated in the case of *Scott v. Times-Mirror Co.*, 181 Cal. 345, 184 Pac. 672. In that case the only evidence offered by the plaintiff, an attorney-at-law, as to compensatory damages, was (1) a biographical sketch setting forth his educational background, and positions of honor held by him, (2) the nature of his practice, (3) the circulation of the defendant newspaper, and (4) the mental anguish suffered by him as a result of the publication. As to the latter his entire testimony was as follows:

"I was very indignant. I felt that a great injustice had been done to me, to my office and to my reputation. I felt it was degrading before my fellow members of the bar and before the community. It hurts yet. I believe it and I know it to be wholly

untrue. I would say, so far as the statements of my office were concerned, it reflected on my office.”

Upon the basis of the above-quoted testimony and his biographical sketch the jury awarded the plaintiff \$7,-500.00 compensatory damages. The California Supreme Court in sustaining this award had the following to say with reference to the degree of proof required in cases of this nature.

“The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel, or of what legal fees he has been deprived through its circulation, or what clients he has lost because of it. It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including the wide publicity given the libel, plaintiff’s prominence in the community where he lives, his good name and reputation, his injured feelings, and his mental sufferings.” (Citing cases.)

The same guide as expressed in the *Scott* case, *supra*, for the assessment of damages is found in *Cook v. East Shore Newspaper, Inc., et al., supra*, where the court upheld an award of \$20,000.00 to a Municipal Judge. To the same effect is *Mattox v. News Syndicate Co.*, 176 F. 2d 897.

Appellee respectfully submits that the evidence of Appellee as to his mental anguish and suffering is considerably stronger than that offered by the plaintiff in the *Scott* case, *supra*, which latter verdict was upheld by the California Supreme Court. Can it be said then, that the verdict in the instant case is so “monstrous,” as that term is used by this Court in the *Guthrie* case, *supra*, to

warrant a finding of an abuse of discretion by the trial court in denying Appellants' motion for new trial? Appellee respectfully submits that obviously it is not.

In *Whitcomb v. Hearst Corp.*, 107 N. E. 2d 295, 301, the Massachusetts Supreme Court in upholding a \$65,000.00 libel judgment commented upon the importance of placing great weight upon the verdict of the jury and discretion of the trial court, saying:

“When considered in the aggregate the total recovery of the plaintiff seems large, especially in view of the numerous and complete retractions prominently published. But the jury and the trial judge saw and heard the plaintiff. From his testimony they could find that he was a man widely known and of much prominence in civil and military life for many years and that he had been entrusted with many heavy responsibilities in both fields. They could find that he enjoyed a substantial and valuable reputation which had been injured to an important degree. If they believed his testimony they could find that the articles had inflicted upon him severe mental suffering. They were in a position, in which we are not, to judge of the sincerity of his claims in this respect.”

In view of the foregoing authorities, Appellee respectfully submits that the amount awarded Appellee by the jury is not grossly excessive or “monstrous,” so as to warrant a finding by this Court of an abuse of discretion by the trial judge in denying Appellants' motion for new trial.

Appellee feels compelled to correct a statement of Appellants appearing on page 14 of their brief in which they cite the case of *Otero v. Ewing*, 115 So. 633, 165 La. 398, as holding that a charge that a candidate for judicial office is not impartial and entertains an admitted bias in

favor of a special interest group is not libelous *per se*. Either Appellants did not read that case or their imagination and enthusiasm carried them away for there was no charge of bias and prejudice involved in that case and the decision stands for three propositions, (1) that the mere fact that a person becomes a candidate does not mean that he offers his good name, reputation and character as a target for libelous attack against him, and (2) that one whose election to office is alleged to have been defeated by the publication cannot recover as damages the salary lost, and (3) charging a candidate for a judgeship with being an agent and a partner of a notorious criminal, and with receiving payments from gamblers and other confessed criminals, and with demanding money in the name of a city official to cover a deficit which did not exist, is libelous *per se*.

An examination of the case can lead to no other conclusion than that Appellants certainly possess flexibility of analyzation.

**Appellee's Answer to Appellants' Contention That
There Is No Evidence of Express Malice to Sup-
port the Verdict and Judgment for Fifteen
Thousand Dollars Punitive Damages.**

Although Appellants have, on page 15 of their Brief, asserted that there is no proof to support the verdict and judgment for Fifteen Thousand Dollars punitive damages, their argument contends that there is no proof to sustain an award of punitive damages at all. To this Appellee respectfully refers this Honorable Court to his argument heretofore made in this Brief with reference to the question of the sufficiency of the evidence to sustain a verdict at all for Appellee and suggests that Appellants by their failure to move for a directed verdict during the

trial are now precluded from urging that there was a total failure of proof and therefore no punitive damages at all should have been awarded to Appellee. If Appellants concede that a finding of punitive damages for Appellee may have been proper but that there is insufficient evidence to substantiate the amount awarded Appellee as and for punitive damages, then an examination of the authorities and the evidence appears to be warranted. In either event, however, the result is the same.

It is universally held that, in the absence of some indication of passion and prejudice, the amount of punitive damage is peculiarly within the province of the trial jury. In the case of *Reynolds v. Pegler, supra*, the Court of Appeals for the Second Circuit, in upholding a punitive damage award of \$175,000.00, had this to say:

“Moreover, in the absence of some indication of passion or prejudice, the amount of punitive damages to be awarded is an issue peculiarly within the province of the jury to decide. It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment and in order to deter them from repeating the offense, but only to review the rulings by the trial judge which are said to constitute reversible error. As he applied the proper standards in passing upon the motion to set aside the verdict and for a new trial, we cannot find any abuse of discretion, and we should be required to reach the same conclusion, even if we thought the verdict excessive.”

Scott v. Times-Mirror Co., supra, a case in which an award of \$30,000.00 punitive damages was upheld, is a leading authority for the proposition that juries have a wider discretion with respect to punitive damage than

they have in the matter of compensatory damages. And this Court in *Liquid Veneer Corporation v. Smuckler*, *supra*, libel case, ruled that it would not invade the province of the jury and say that the punitive award was excessive. So it would seem crystal clear that a punitive award would have to almost be beyond all realm of understanding to be set aside. This Honorable Court is not faced with that situation here, however, for there was ample evidence of malice to substantiate the jury's finding.

It is to be noted from the evidence that the publication here complained of was published as a nearly full page advertisement on Sunday, November 5, 1950, after Appellee had left Las Vegas [R. 120] and the election in which Appellee was a candidate was held November 7, 1950 [R. 120, Pltf. Ex. 3]. Obviously, the jury could and probably did infer that the publication was timed so that there could be no reply to the charges contained therein, a definite indication of malice.

No effort was made to investigate the truth of the facts contained in the Gardner editorial either from the Appellee [R. 120-121] or from Gardner himself. Appellants' only contact with Gardner was to ask for his consent to a statement, which he refused, and a further request for permission to use the editorial, which he stated he could not prevent because it wasn't copyrighted [R. 173]. A failure to investigate the truth of the charges has been deemed a wanton and reckless disregard of the rights of others and is therefore malicious, for which punitive damage will lie. (*Nevada State Journal Pub. Co., et al. v. Henderson, supra.*)

Probably the best indication from which the jury found the Appellants were motivated by malice is found in the

publication itself wherein the Appellants lower-cased the first letters of the given and surname of Appellee. Could a more malicious intent be evidenced? Here we had a man who was occupying the highest judicial position in the State of Nevada not even being shown the courtesy of writing his name in a proper manner, a courtesy which is normally afforded to all persons. Couldn't the jury reasonably infer from this that the Appellants were attaching a "smallness" to Appellee which could only come from those with malicious motives? Is the lower-casing of a Supreme Court Justice's name comment or criticism or is it evidence of a vicious animosity which comes from a mind with evil motives intending to destroy and malign another? The jury gave the only proper answer and Appellee respectfully submits they were amply warranted in so doing.

But the deep-seated animosity and hatred of Appellants toward Appellee fairly screams out at the reader of that advertisement. The whole advertisement, covering almost a full page of the newspaper, is in practically every line a vicious attack upon the integrity, honesty, and impartiality of Appellee in the conduct of his office as a Supreme Court Justice.

In large print we find the words "Urge your friends NOT to vote for horsey for Supreme Court Justice!" And this particular choice paragraph, viciously attacking Appellee, continues in essence to charge Appellee as being prejudiced in favor of labor racketeers, gambling, and specialized interest.

The advertisement being simply one against Appellee, also reads "VOTE ONLY FOR AN IMPARTIAL CANDIDATE FOR SUPREME JUSTICE," which amounts to a positive charge that Appellee is not, and has not been, an impartial judge.

The advertisement further charges Appellee with a bias in favor of a special interest or group in that, inasmuch as it was an attack upon the Appellee, it states "NO MAN whose statements show a BIAS in favor of any special interest or group has any business on the bench!"

The final attack made upon Appellee in the advertisement charges Appellee with having a bias against the general public interest.

Could a publication the size of plaintiff's Exhibit 3 and the distribution given thereto by Appellants be said to have been accomplished by persons having altruistic motives? *Cook v. East Shore Newspaper, Inc., supra*, is authority for the proposition that the size, display and circulation of the publication may be taken into consideration by the jury in assessing punitive as well as compensatory damages.

Appellants in their Brief contend that inasmuch as Appellant Cahlan testified he had no personal animosity toward Appellee, there was no evidence of malice to warrant a finding of punitive damages. Appellee is not too impressed with that testimony and neither was the Court of Appeals for the Second Circuit when a similar contention was before it in *Reynolds v. Pegler, supra*:

"The mere fact that there was no proof of personal ill-will or animosity on the part of any of the corporate executives toward plaintiff does not preclude an award of punitive damages. Malice may be inferred from the very violence and vituperation apparent upon the face of the libel itself, especially where, as here, officers or employees of each corporate defendant had full opportunity to and were under a duty to exercise editorial supervision for purposes of revision, but permitted the publication of the column without investigation, delay or any alteration

whatever of its contents. The jury may well have found on this evidence a wanton or reckless indifference to plaintiff's rights."

Appellee respectfully submits, therefore, that while he seriously questions the right of Appellants as a matter of law in this case to raise this question, it matters not, for there is ample evidence in the record to justify the award made by the jury, and being an award of punitive damages, a matter peculiarly within the province of the jury, the appellate Court, we respectfully submit, will abstain from interference with said award.

Appellee's Answer to Appellants' Contention That the Trial Court Erred in Admitting in Evidence the 1946 and 1950 Clark County Election Returns to Appellants' Prejudice.

Appellants contend, commencing on page 15 of their Brief that the Court erred in admitting in evidence the Clark County Election returns for the years 1946 and 1950. In support of this contention they cite the case of *Otero v. Ewing, supra*. While the actual holding of the *Otero* case is not as broad as Appellants would apparently like to have it, the Louisiana Court actually holding that a special damage claim for loss of salary cannot be sustained, let us assume that Appellants' statement as to the holding is correct. An examination of the record discloses that the very nature of Appellee's offer excluded any possibility of any claim being made for damages resulting from the loss of the election [R. 110-112, 178-179]. The returns were offered, as the record discloses, for the purpose of indicating a state of opinion in Clark County as to plaintiff's reputation in 1946 and 1950 and as evidence to support Appellee's claim for gen-

eral damages resulting from a loss of reputation, a loss which is conclusively presumed in publications which are libelous *per se* as here. (33 Am. Jur., Secs. 5, 200, 282.) See *Galveston Tribune v. Johnson*, *supra*, where the Texas court held even error in admitting opinion evidence as to plaintiff's reputation was not prejudicial because only general damages were awarded and there is a presumption of damage from an article which is libelous *per se*.

Assuming, for the purpose of argument, that no claim can be made for damages resulting from a loss of an election, it is settled that although evidence may be inadmissible as to a particular element of special damage, it may nevertheless be admissible to prove general damages. (*Mattox v. News Syndicate Co.*, *supra*.) In that case, evidence was admitted showing that plaintiff had been away from work for a season. Plaintiff had not alleged special damage of wages lost in her complaint and for that reason such evidence was inadmissible. However, such evidence was permitted to be admitted for the purpose of showing plaintiff's mental suffering especially where, as here, as we will later show, the Court instructed the jury to award no damages for wages lost.

Appellee respectfully submits, however, that the admission of the returns did not establish a loss of an election, a showing which must be made to be objectionable as proof of special damages under the doctrine of the *Otero* case. It will be remembered that the returns were limited to Clark County. Inasmuch as the office of Justice of the Supreme Court is a state office and an election pertaining thereto is statewide, the returns from one county would not establish a loss of an election. Furthermore, an examination of Appellee's Exhibits 2 and 5 shows

that Appellee carried Clark County in both the 1946 and 1950 elections and, therefore, no loss of election was established by such evidence and the admission thereof cannot be said to be objectionable under the doctrine of the *Otero* case.

Appellee respectfully suggests that even if he had offered the returns for the purpose of showing damages resulting from the loss of the election, which he most certainly did not, such offer would have been proper. In the case of *Houston Printing Co. v. Hunter*, 105 S. W. 2d 312, 320, the Court stated:

“Plaintiff pleaded injury to his political career and asked for damages because therefor, actual as well as special. We think an officer or even a candidate for office could plead a state of facts which, if proven, would entitle him to actual or general damages to his political career, or, upon the other hand, he could so plead and prove it as special damage. In the case of *Jenkins v. Taylor* (Tex. Cir. App.), 4 S. W. (2d) 656, 661, the court had under consideration the elements of plaintiff’s general or actual damages for an alleged libelous instrument, and in discussing a requested instruction which was refused by the court, it was said:

“‘The jury should not have been limited to the injury to plaintiff’s business; he was entitled to injury to his reputation generally, and also to his political career, especially the latter, since the attack made upon him was in connection with his conduct as an officer and while he was a candidate for the same office. The petition does not allege any special damage, and it was not necessary that any should be proved.’

“The opinion as reported does not disclose in what manner plaintiff claimed his political career had been

injured, but we may assume the allegations supported the judgment and thus justified the appellate court in its statement of the law applicable to the case.

“In Tex. Jur. Vol. 27, P. 700, §57, it is said: ‘Injury resulting to plaintiff’s political career * * * are also proper elements of special damages when pleaded and proven.’

“Likewise, in case of *Galveston Tribune v. Johnson*, 141 S. W. 302, 304, in which a writ of error was refused, it was said: ‘Appellant specially excepted to certain portions of the petition wherein appellee set up as elements of special damages injury to his political career and his opportunities to secure public offices, which were overruled. In this we do not think the court erred.’ The language used by the court indicates that a plea had been made by plaintiff that would have entitled him to special damages on account of injury to his political career had it been proven.”

It will be noted that both the *Houston Printing Co.* case and *Taylor v. Jenkins* quoted therein are later pronouncements on this subject than is *Otero v. Ewing* relied upon by Appellants.

While Appellee earnestly contends that no error was committed in the admission of the Clark County 1946 and 1950 election returns, he submits that even though such admissions could be considered as error, such error was harmless and Appellants were not prejudiced thereby in view of Instruction No. 13 given by the trial court. This instruction [R. 84] provides as follows:

“One whose election to office is alleged to have been defeated by the publication of a libel cannot recover damages resulting from the loss of an elec-

tion. Damages based on loss of election are too speculative and uncertain to be considered by the jury.”

It doesn't require a very detailed study of that instruction to realize the tremendous scope covered by the charge. This instruction did not merely prevent consideration of the matter of lost salary resulting from the loss of an election which was the holding of the court in the *Otero* case, but it prevented consideration of any damages “resulting” from or “based upon” the loss of an election. So, Appellee respectfully submits, that the jury after reading that charge could not have possibly given any credence to the admission of the returns even if Appellee had offered them for the purpose of recovering damages for the loss of the election. Nor could they have given any credence to the returns for the purpose of indicating loss of reputation if, as Appellants contend, those damages stemmed from the loss of the election for the instruction was so broad as to exclude consideration of *any* “damages *based upon* the loss of an election.” Appellants say on page 15 of their Brief:

“Damages flowing from the loss of an election cannot be considered because they are too speculative and uncertain.”

Isn't the language of the Court's instruction almost identical to the language used in Appellants' Brief? Obviously then the jury could not have considered the election returns admitted in evidence. In *Terry v. United States Fidelity & Guaranty Co.*, 82 P. 2d 532, the trial court erroneously admitted in evidence a custom of payment for subcontractors engaged in excavation work. In its charge, however, it told the jury that they could not

consider that custom in arriving at the amount of damages if they found in favor of the plaintiff. The Supreme Court of Washington held that such a charge removed any possibility of prejudicial error. See also *Mattox v. News Syndicate, Inc.*, *supra*, where Court held that error, if any, was cured by an instruction not to consider certain evidence in assessing damages in libel action.

Appellee further contends that any possible error in the admission of the 1946 Clark County returns was harmless for the further reason and in view of the fact that competent evidence of a similar nature was admitted and without objection. Appellee testified as part of his biographical sketch that he had been elected to the office of Justice of the Supreme Court in 1946 "thanks to a large majority in Clark County" [R. 109]. That this testimony was competent has been established by the case of *Scott v. Times-Mirror Co.*, *supra*, holding that a biographical sketch is admissible for the purpose of establishing general damages. Further, there was no objection by Appellants to the testimony. Any error, if there be error, must be considered to be harmless.

Washington Post Co. v. O'Donnell, 43 App. D. C. 215, cert. den. 35 S. Ct. 663, 238 U. S. 625, 59 L. Ed. 1495.

Appellee also asserts that any possible error in the admission of the 1950 Clark County returns was harmless for the additional reason that until the matter was elicited on cross-examination by Appellants there was no evidence of the loss of the 1950 election. It will be remembered that when the 1950 returns were admitted they were limited to Clark County, which we have already seen would not establish a loss of election of a state office.

It was not until the cross-examination of Appellee by Appellants that Appellee's defeat in 1950 was established [R. 126]. Appellants must be deemed to have waived any objection to the admission of the 1950 Clark County returns by bringing out the evidence of the loss of election themselves and such error, if any, in the admission of said returns, was harmless and not prejudicial to Appellant.

Nock v. Fidelity & Deposit Co., 175 S. C. 188,
178 S. E. 839.

In summation then, Appellee submits that the admission of the 1946 and 1950 Clark County returns was not erroneous, as they were not offered for the purpose of establishing damages for the loss of an election and did not in fact establish a loss of an election; that said returns were offered for an admissible purpose; that even if Appellee had offered said returns to establish damages resulting from the loss of an election, such admission would be proper pursuant to *Houston v. Hunter, supra*; that assuming error resulted in the admission of said returns, such error was cured, and therefore harmless, in view of the Court's instructions; that the admission of the 1946 Clark County returns, if error, was harmless in view of the admission of competent evidence of a similar nature which evidence was not objected to; and that the admission of the 1950 Clark County returns, if error, was harmless because the loss of the 1950 election was not established until elicited by Appellants on cross-examination.

Conclusion.

In view of the argument herein advanced and the authorities herein cited, Appellee respectfully submits that the judgment of the United States District Court for the District Court of Nevada be affirmed.

Respectfully submitted,

RUDIAK, HORSEY & LIONEL,

Successors to,

RALLI, RUDIAK & HORSEY, and

CLYDE D. SOUTER,

Of Counsel,

Attorneys for Appellee.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING Co., Inc., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCOR-
PORATED, SOUTHERN NEVADA CHAPTER, a corporation,

Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANTS' REPLY BRIEF.

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FILED

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PAUL B. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

Reply to appellee's answer to appellants' contention that trial
court erred in admitting in evidence the 1946 and 1950 Clark
County election returns to appellants' prejudice..... 1

Conclusion 9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brewer v. Hearst Pub. Co., 185 F. 2d 846.....	4, 5, 7
Chambers v. National Battery Co., 34 Fed. Supp. 834.....	7
Estill v. Hearst Pub. Co., 186 F. 2d 1017.....	4
Frieman v. Mills, 217 P. 2d 687.....	4
Howard v. Southern California Associated Newspapers, 213 P. 2d 399	4

TEXTBOOKS

5 Corpus Juris Secundum, p. 973.....	8
53 Corpus Juris Secundum, pp. 335, 336.....	4
53 Corpus Juris Secundum, p. 364.....	7

No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING CO., INC., a corporation,
A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCORPORATED,
SOUTHERN NEVADA CHAPTER, a corporation,
Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANTS' REPLY BRIEF.

I.

Reply to Appellee's Answer to Appellants' Contention
That Trial Court Erred in Admitting in Evidence
the 1946 and 1950 Clark County Election Returns
to Appellants' Prejudice.

The 1946 and 1950 election returns of Clark County were offered and received over defendants' objection as proof of "a state of opinion in Clark County" [R. 110] and "as possible evidence of the effect of the advertisement in question upon the people of Clark County" [R. 179] and "for the purpose of contrast." [R. 111.]

The admission of these election returns as proof of the opinion of Clark County inhabitants of Judge Horsey's reputation, resulting from the publication of the advertisement, was viciously prejudicial to the defendants. The election returns are not only hearsay evidence, but were completely irrelevant and immaterial. There was no rational or logical connection between them and the reputation of the plaintiff, as the same might have resulted from the advertisement complained of. They were competent proof of one thing only, and that was the number of votes cast for each candidate.

It is difficult to conjure evidence which would have been any more prejudicial than these election returns. From them the jury was permitted to find that those who voted for Judge Horsey's opponent, at least in excess of the votes received by his 1946 opponent, did so because of damage to his reputation resulting from the advertisement. In other words, the jury was permitted to find that, as a result of the advertisement, Judge Horsey's reputation was actionably damaged in the viewpoint of thousands of voters who voted for his opponent. By further inference from this so-called concrete evidence, the jury was permitted to find that his reputation must have also been maligned in the minds of thousands of others who did not cast their votes.

There are many and sundry reasons why voters cast their ballots as they do. The personalities of the candidates influence them. A person may in 1946 have voted against Judge Horsey's opponent for many reasons. In 1950, they may have voted for Judge Horsey's different opponent for many reasons. The population markedly changed in Clark County in the intervening four years and the political leanings of the new inhabitants may have

been against Judge Horsey's party. Judge Merrill may have made a more effective campaign in Clark County than did Judge Horsey. It is impossible to point to one particular event and say that governed the nature and result of the vote. Yet the Trial Court, by admitting these election returns, permitted the jury to find that the change in votes from 1946 resulted solely from the advertisement and was direct evidence of a change in opinion as to the reputation of Judge Horsey brought about solely by means of the advertisement. The election returns were, therefore, not relevant proof of a change in opinion, resulting from the advertisement complained of.

The 7,020 who voted for Judge Merrill were not in Court. They did not testify they had read the advertisement and, if so, the effect of the advertisement on their opinion of Judge Horsey or even whether they had an opinion. The defendant had no opportunity to cross-examine to test the evidence.

Judge Horsey would not have been permitted to testify that he had talked to John Smith or John Doe and they told him they had read the advertisement in the paper and had changed their opinion about him and decided to vote against him. What John Smith and John Doe allegedly said would be hearsay. Their statements out of Court, not under oath, and without an opportunity to be tested by cross-examination, would be hearsay. How then, can Judge Horsey be permitted to say that those who voted against him as shown by the official election returns had done so solely because his reputation in their opinion had been impugned by the political advertisement complained of. He cannot, and the introduction of the election returns as proof of damage to Judge Horsey's reputation was erroneous and highly prejudicial to the defendants.

It is impossible for this Court to say that the election returns in no way influenced the verdict of the jury, either as to the question of liability or the question of damages and was, therefore, harmless error.

The only real explanation for the jury's verdict of \$10,000 compensatory damages and \$15,000 punitive damages was their consideration of the prejudicial election returns.

Without the prejudicial election returns before them, the jury quite likely would have brought in a verdict of no cause of action and, if not, then their verdict would have been in a nominal amount. It is to be noted that the plaintiff did not move for a directed verdict and that the Trial Court submitted to the jury the question of whether the advertisement was libelous. This demonstrates that neither plaintiff nor the Trial Court felt the advertisement to be libelous *per se*. It is well settled that whether or not a publication is libelous *per se* is a question of law for the Trial Court to determine and not the jury. (*Brewer v. Hearst Pub. Co.*, 185 F. 2d 846, 849 (C. C. A. 7th, 1950); *Estill v. Hearst Pub. Co.*, 186 F. 2d 1017, 1021 (C. C. A. 7th, 1951); *Howard v. Southern California Associated Newspapers*, 213 P. 2d 399, 402 (Cal., 1950); *Frieman v. Mills*, 217 P. 2d 687, 691 (Cal., 1950); 53 C. J. S. 335, 336.) Therefore, it must be taken that both plaintiff and the Trial Court construed the language of the advertisement to be ambiguous and capable of two meanings, one libelous and the other not. (*Estill case, supra.*) In fact, Judge Horsey on the witness stand admitted that, as far as he was concerned, the advertisement only implied and indicated that he was in association with labor racketeers. In other words, Judge Horsey admitted that this advertisement, if libelous, was so only because of an innuendo, and therefore not libelous

per se, but *per quod*. [R. 123.] (*Brewer case, supra.*) In his answering brief on appeal, Judge Horsey further recognized the weakness of his case by laboriously devoting thirteen pages in argument in an attempt to convince this Court that the advertisement was libelous *per se*. It is appellants' position that the advertisement was neither libelous *per se* or *per quod* and further that the advertisement was well within the privilege of fair comment and criticism on matters of public interest. It is admitted that Judge Horsey stated he was pro-labor. [R. 115, 133.] It is clear that the definition of pro-labor was Editor Gardner's and not stated or inferred to be that of Judge Horsey. The remainder of the editorial was a statement of the Editor's opinion and analysis of the effect of the decision of the Nevada Supreme Court in the *White Cross Drug Store* case. To state an opinion that a decision of a Court or a Judge "enables the racketeers to force every business in the County into Union contracts" is not libel. It is a fair comment on, and criticism of, a decision of a Court. This advertisement, therefore, clearly meets the test of the essential elements of fair comment, namely, (1) that the publication is an opinion; (2) that it relates not to an individual, but to his acts; (3) that it is fair, namely, that the readers can see the factual basis for the comment and draw their own conclusions, and (4) that the publication relates to a matter of public interest. (*Brewer case, supra.*) The verdict was indeed contrary to the law and the evidence and appellants' motion to set it aside and for a new trial should have been granted. Under such circumstances, it cannot be said that the erroneous admission of the election returns was harmless error.

Not only did Appellee fail to establish a cause of action, but also, in view of his lack of proof of damages, the jury's verdict of \$10,000 compensatory damages and \$15,000 punitive damages can only be accounted for through their consideration of the prejudicial election returns. From those returns, the jury was permitted to find that the publication actionally damaged Judge Horsey's reputation in the opinions of the 7,020 residents of Clark County who voted for his opponent.

The only other evidence of damages were Judge Horsey's self-serving declarations as to the operation of his mind and the improper evidentiary conclusions of his son. Judge Horsey testified that after leaving the Bench he had more time and "commenced to realize the enormity of the injury, and it got so that I certainly couldn't talk to everybody that I would meet in regards to the situation" [R. 122]; that "I would hate to stop and talk with them, because it looked as though that they would have some suspicions as to my honor, and integrity * * * until I got so I didn't want to meet people, but I would take walks at night * * *." [R. 123.] That "when I got down here and realized the enormity of the injury, and the hundreds and thousands of people that had come in that I didn't know, I realized that it would take all my time and more than my time to try to meet people and disabuse their minds as to my honor and my integrity, and how could I practice law under those conditions? When the expenses of practicing law have greatly increased, and there are about seventy attorneys in Clark County, and I would have to start all over again, and give my whole attention to trying to disabuse and trying to overcome the injury I have received." [R. 124, 125.]

The substance of this testimony and the direct testimony as to damages is then that he stopped walking on the street in the daytime because he felt people were suspicious of him and took to taking his walks at nighttime and that he felt that he had to meet all the new people who moved into Clark County, who did not know him, and disabuse their minds as to his honor and integrity.

The purported force of Judge Horsey's testimony on direct examination was nullified on cross-examination when he admitted that it was his lifetime practice to take walks at night [R. 135, 136] and that as a result of losing the election, "I was broken in health, at least that my spirit had been broken." [R. 134.]

Judge Horsey's son simply testified that his father, after opening a law office in Las Vegas, "started going home early in the afternoons" [R. 141], and then was erroneously permitted by the Court to express the opinion that his father's reaction to the advertisement was "the body was there, the heart and spirit wasn't." [R. 141.]

It is, therefore, apparent that no special damages were proven. No loss of income was shown, no effect on appellee's law business was exhibited and, in fact, no out of pocket losses of any kind were attempted to be proven. The law is well settled that if the words are not actionable *per se*, there can be no recovery of general damages, but only of special damages. (53 C. J. S. 364; *Brewer* case, *supra*; and *Chambers v. National Battery Co.*, 34 Fed. Supp. 834.) On this state of the record it is obvious that the jury was influenced by the prejudicial election returns, and from them found damages to Judge Horsey's reputation resulting from the advertisement. Their admission into evidence was, therefore, not only erroneous, but prejudicial to the defendants.

In addition to the other prejudicial nature of the election returns, their importance was highlighted in the minds of the jurors by the circumstances of their admission. When they were first offered, the attorneys and the Court embarked on a two page argument on their admissibility, resulting in the admission of the 1950 returns and the exclusion of the 1946 returns. [R. 110-112.] On rebuttal, appellee again offered the 1946 returns and, after further argument by counsel in the presence of the jury, the Court admitted the returns, saying [R. 179]:

“When it was first offered I was inclined and did rule against the admission of that evidence on the theory that the loss of an election had no bearing upon any of the merits of this case but now, in view of the statement of counsel, as to its limited purpose, *as a circumstance intending to show the effect of the publication in Clark County*, it will be admitted in evidence.” (Emphasis supplied.)

The Court’s comment on the admission of these returns and there being so admitted at the close of all of the testimony unquestionably highlighted and emphasized their importance in the minds of the jury. Under such circumstances, it cannot be said their admission was harmless error.

The circumstances under which error in the admission of evidence may be deemed prejudicial are set forth in 5 C. J. S. 973 as follows:

Where it is impossible (1) to determine in the particular case whether or not the jury were in the admission of the evidence complained of unduly influenced in reaching the verdict which was returned, or (2) error in admitting evidence in any particular case will more liberally be deemed to be prejudicial and to require a reversal where

the case is close on the facts or the point is not clearly established, or (3) where the manner of admitting particular evidence or the nature thereof is peculiarly such as to create a situation prejudicial to the party against whom such evidence is introduced or (4) where a verdict in favor of the party introducing the evidence is excessively large in view of the other evidence in the case.

Under all four of the above circumstances, the admission of the 1946 and 1950 election returns in evidence must be deemed prejudicial.

Conclusion.

For the reasons stated herein and in appellant's main brief, appellants respectfully submit a decree should issue setting aside and reversing the verdict of the jury and the judgment of the lower court entered pursuant thereto.

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No. 14739

United States
Court of Appeals
for the Ninth Circuit

ROLLAND LINDSEY, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Transcript of Record

In Two Volumes
VOLUME I.
(Pages 1 to 272, inclusive.)

Appeal from the District Court for the District of Alaska,
First Division

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on	10
Motion and Order for Admission to Bail Pending	9
Notice of	8
Statement of Points on (USCA).....	527
Arguments to the Jury, Transcript of.....	467
Mr. Munson	468, 515
Mr. Gilmore	482
Mr. Siegler	501
Arraignment and Plea of Not Guilty.....	5
Certificate of Clerk to Transcript of Record...	10
Indictment	3
Instructions to the Jury, Transcript of.....	450
Judgment and Commitment	7
Minute Order, Oct. 13, 1954—Arraignment and Plea of Not Guilty.....	5
Motion and Order for Admission to Bail.....	9

ii.

Names and Addresses of Attorneys.....	1
Notice of Appeal	8
Statement of Points to be Relied Upon (USCA)	527
Transcript of Arguments to the Jury.....	467
Mr. Munson	468, 515
Mr. Gilmore	482
Mr. Siegler	501
Transcript of Court's Instructions to the Jury	450
Transcript of Proceedings and Testimony.....	11
Exhibits for Defendant:	
A—Letters dated Aug. 22, Loretta to “Dear Mom”, “Dear Dad” and “Dear Janice, Randy and Pat”	
	286, 287
B—Statement of Loretta Lindsey, Aug. 25, 1954	
	341
Transcript of Tape Recording, Test of Loretta Lindsey	385
Witnesses:	
Anderson, Charles L.	
—direct	147
—rebuttal, direct	374
—cross	401
—redirect	414
Baer, Robert E.	
—direct	365
—cross	365

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Clarke, Jack W.

—rebuttal, direct	426
—cross	430
—redirect	438, 441
—recross	440

Dalton, Florence

—direct	142
---------------	-----

Johnson, Orville C.

—direct	351
—cross	353
—redirect	359, 361
—recross	359

Lindsey, Loretta

—direct	18
—cross	53

Lindsey, Robert

—direct	111
—cross	120

Lindsey, Rolland

—direct	245
—cross	313
—recalled, cross	370

Lindsey, Victoria

—direct	206
—cross	229
—redirect	241, 243
—recross	242

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Pawsey, Mrs. Lydia

—direct	157
—cross	175
—redirect	180

Pawsey, Pat

—direct	183
---------------	-----

Riewold, Donald Raymond

—direct	135
—cross	151

Salazar, Louis

—direct	347
—cross	348

Stagg, Dr. Lee

—direct	150
—cross	153
—redirect	154
—recross	155

Tatsuda, Bill

—direct	361
—cross	362
—redirect	362
—recross	363

Ziegler, Robert H.

—direct	188
—cross	198
—redirect	203
—recross	204

Verdict	6
---------------	---

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In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan

No. 1643-KB

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROLLAND LINDSEY, Defendant.

INDICTMENT

65-4-12 ACLA 1949 (Rape); 65-9-10 ACLA 1949
(Sodomy); Ch. 81 SLA 1953 (Influencing
Witness)

The Grand Jury Charges:

Count I—65-4-12 ACLA 1949 (Rape)

That on or about October 22, 1951 at Ketchikan in the District of Alaska and within the jurisdiction of this Court, Rolland Lindsey did wilfully, unlawfully and feloniously carnally know and abuse a female person under sixteen years of age, namely, Loretta Lindsey.

Count II—65-4-12 ACLA 1949 (Rape)

That on or about October 23, 1952, at Ketchikan in the District of Alaska and within the jurisdiction of this Court, Rolland Lindsey did wilfully, unlawfully and feloniously carnally know and abuse a female person under sixteen years of age, namely, Loretta Lindsay.

Count III—65-4-12 ACLA 1949 (Rape)

That on or about February 27, 1954, at Ketchikan in the District of Alaska and within the jurisdic-

tion of this Court, Rolland Lindsey did wilfully, unlawfully and feloniously carnally know and abuse a female person under sixteen years of age, namely, Loretta Lindsey.

Count IV—65-9-10 ACLA 1949 (Sodomy)

That on or about the 22d day of October, 1951, at Ketchikan in the District of Alaska and within the jurisdiction of this Court, Rolland Lindsey did wilfully and feloniously have unnatural carnal copulation by means of the mouth with Loretta Lindsey.

Count V—65-9-10 ACLA 1949 (Sodomy)

That on or about the 23d day of October, 1952 at Ketchikan in the District of Alaska and within the jurisdiction of this Court, Rolland Lindsey did wilfully and feloniously have unnatural carnal copulation by means of the mouth with Loretta Lindsey.

Count VI—65-9-10 ACLA 1949 (Sodomy)

That on or about the 27th day of February, 1954, at Ketchikan in the District of Alaska and within the jurisdiction of this Court, Rolland Lindsey did wilfully and feloniously have unnatural carnal copulation by means of the mouth with Loretta Lindsey.

Count VII—Ch. 81 SLA 1953
(Influencing Witness)

That on or about the 25th day of August, 1954, at Ketchikan in the District of Alaska and within the

jurisdiction of this Court, Rolland Lindsey corruptly endeavored to influence a witness in the District Court for the District of Alaska, to wit: Loretta Lindsey, then and there duly subpoenaed to appear before the Grand Jury of the District Court for the District of Alaska.

A True Bill.

/s/ STUART RUSSELL,
Foreman

/s/ T. E. MUNSON,
United States Attorney

Witnesses: Loretta Lindsey, Florence Dalton.

[Endorsed]: Filed in Open Court Oct. 11, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

Wednesday, October 13, 1954

Defendant appeared for arraignment and with A. H. Ziegler as counsel; C. Donald O'Connor, Assistant U. S. Attorney, appeared for the Government. Defendant was arraigned; reading of the Indictment was waived; as also was the time for entry of a plea. Defendant stated that his true name was as captioned above. He personally entered a plea of Not Guilty.

[Title of District Court and Cause.]

VERDICT

We, the Jury duly impaneled and sworn in the above entitled cause, find the defendant guilty of the crime charged in Count I of the Indictment; guilty of the crime charged in Count II of the Indictment; guilty of the crime charged in Count III of the Indictment; guilty of the crime charged in Count IV of the Indictment; guilty of the crime charged in Count V of the Indictment; guilty of the crime charged in Count VI of the Indictment; not guilty of the crime charged in Count VII of the Indictment.

Dated at Ketchikan, Alaska, this 26th day of November, 1954.

/s/ GLENN A. LANE,
Foreman

[Endorsed]: Filed November 27, 1954.

In the District Court for the District of Alaska,
Division Number One, at Ketchikan

No. 1643-KB

UNITED STATES OF AMERICA, Plaintiff,
 vs.
ROLLAND LINDSEY, Defendant.

JUDGMENT AND COMMITMENT

On this 29th day of November, 1954 came the attorney for the Government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been found not guilty of the charge of Influencing a Witness, but has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of Rape in violation of Section 65-4-12, ACLA 1949 as charged in the indictment filed in the above-entitled case, and has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of Sodomy in violation of Section 65-9-10 ACLA 1949 as charged in the indictment filed in the above entitled case; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court.

It Is Adjudged that the defendant is Guilty as charged and convicted of the crimes of Rape and Sodomy.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of Twelve Years on Each of Three Counts of Rape and for a period of Ten Years on Each of Three Counts of Sodomy, Sentences to Run Concurrently.

It Is Ordered that the Clerk of this Court deliver a certified copy of this judgment and commitment to the United States Marshal, the Superintendent of the Federal Jail, or other qualified officer and to the defendant, and that the copies serve as the sentence of the defendant.

/s/ GEORGE W. FOLTA,
U. S. District Judge

[Endorsed]: Filed December 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Rolland Lindsey, 1067 Woodland Avenue, Ketchikan ,Alaska.

Counts One, Two and Three, Rape; Counts Four, Five and Six, Sodomy.

Concise Statement of Judgment: Judgment entered on November 29th, 1954, sentencing defendant for a period of 12 years on each of Counts One, Two and Three, the same to run concurrently; and, ten years on each of Counts Four, Five and Six, the same to run concurrently and also concurrently with the sentence imposed on Counts One, Two and Three, or a total of 12 years. Defendant was ad-

judged guilty before sentencing in accordance with jury's verdict, and upon sentencing was committed to the custody of the Attorney General of the United States.

Defendant now in custody and moves for admission to bail pending appeal.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated Judgment.

Dated at Ketchikan, Alaska, December 4, 1954.

/s/ ROLLAND E. LINDSEY,
Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 4, 1954.

[Title of District Court and Cause.]

MOTION FOR ADMISSION TO BAIL

Comes now the above named defendant, Rolland E. Lindsey, and respectfully petitions the Court for his admission to bail pending the appeal of the above case to the Ninth Circuit Court of Appeals, and shows the Court,

That he has filed his Notice of Appeal from the judgment entered in the above cause, on November 29th, 1954, within the time provided by law; that he is advised by counsel that there is a substantial question of law involved in the above cause, and that he in good faith intends to prosecute his appeal and that this Motion is made in good faith.

This Motion is based upon the records and files in this suit, and the evidence adduced at the trial wherein the tape recording of Loretta Lindsey, the prosecuting witness, was admitted in evidence over the objection of defendant's counsel, and the witness Dr. Charles Anderson, for plaintiff, was permitted to testify concerning his opinion arising in part out of the tape recording of said Loretta Lindsey's testimony while under the influence of a so-called Truth Serum Drug.

Dated at Ketchikan, Alaska, December 7th, 1954.

/s/ ROLLAND E. LINDSEY,
Defendant

ORDER

Upon reading the foregoing Motion, the Court finds there does exist a substantial question of law, on appeal, in the above cause, and defendant is admitted to bail in the sum of \$15,000.

Dated at Ketchikan, Alaska, December 7th, 1954.

/s/ GEORGE W. FOLTA,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do

11

hereby certify that the hereto attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Ketchikan, Alaska, this 22nd day of April, 1955.

[Seal] J. W. LEIVERS,
Clerk of District Court
/s/ By A. V. SIMONSEN,
Deputy Clerk

In the United States District Court for the District
of Alaska, Division No. 1, at Ketchikan

No. 1643-KB

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROLLAND EARL LINDSEY, Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that on the 22nd day of November, 1954, at 10:00 o'clock a.m., at Ketchikan, Alaska, the above-entitled cause came on for trial before a jury; the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Theodore E. Munson, United States Attorney, and C. Donald O'Connor, Assist-

ant United States Attorney; the defendant appearing in person and by A. H. Ziegler and Patrick J. Gilmore, Jr., his attorneys; respective counsel having announced they were ready for trial, a jury was duly empanelled and sworn to try the cause and was duly admonished by the Court; thereupon Court was recessed until 2:00 o'clock p.m., reconvening as per recess, with all parties present as heretofore, and the jury all present in the box; whereupon the following proceedings were had:

The Court: The prosecution may make its opening statement. [1*]

Mr. Munson: Your Honor, before beginning the opening statement, I would like to move that because of the nature of this case and the tender years of the complaining witness that the public be excluded during the opening statements and during the time that she testifies on the stand.

The Court: Well, that is because of her reluctance, you mean?

Mr. Munson: Yes, your Honor.

The Court: Well, the Court will pass on that after the opening statements are made. You may proceed with your opening statement.

Whereupon opening statements were made by respective counsel; and thereupon the following proceedings were had:

The Court: Now, does either party have any request to make as to who should be excluded or

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

excepted from the exclusion order that the Court is about to make.

Mr. Munson: Your Honor, I would like Doctor Anderson to be excepted from the exclusion order.

The Court: Well, is he going to be of any assistance to you here?

Mr. Munson: I believe he will, your Honor. He is going to give expert testimony based on the hypothetical questions.

The Court: Is there anyone that is closely related to the prosecuting witness that you think should be here? [2]

Mr. Munson: Yes, your Honor. Mrs. Dalton is her aunt.

The Court: Has the defendant any close relatives or friends that he wishes to remain?

Mr. Gilmore: Well, my only reaction, your Honor—we haven't given this hardly any thought—would be that with reference to the exclusion or the exception of Doctor Anderson to the exclusion order that it would be our duty and responsibility to object, I would think.

The Court: Well, but don't forget I am not excluding witnesses. It is the public that is being excluded.

Mr. Gilmore: Well, we have no objection to the public.

The Court: Well, I just thought that perhaps the defendant might have some close relative or very close friend that he would like to have in court here. I don't know.

Mr. Gilmore: Well, his wife; she is his closest.

The Court: She will be excepted from the order.

Mr. Gilmore: Thank you.

Mr. Ziegler: There is just one thing; if the Court please, as long as that part of the case is going to be subject to that rule, I think the exclusion order should apply throughout the trial.

Mr. Munson: We have no objection.

Mr. Ziegler: I think, your Honor, it will facilitate [3] the trial probably.

The Court: Well, but why should the spectators be excluded except when the testimony of this prosecuting witness is being received. It doesn't differ from any other case otherwise, so I can only——

Mr. Ziegler: Well, our position is this, your Honor, that the excluding of them during part of the time, if that is done, they should be excluded all of the time during the trial or none of the time. In other words, if it is going to be a public trial, then they should never be excluded at any time.

The Court: Well, that merely ignores the reason underlying the exclusion of the general public.

Mr. Munson: Your Honor, I believe the reason for the exclusion is because this witness is extremely reluctant to testify to these——

The Court: The reason has already been stated—the tender age and the embarrassment and reluctance of the prosecuting witness.

Mr. Ziegler: If the Court please, the same thing applies to the defendant when he testifies. It is embarrassing to him.

The Court: Well, it may be, except that the decisions don't support excluding the public on his account because he is an adult. The same would be

true if the [4] prosecuting witness were an adult; I couldn't exclude the public over objection.

Mr. Ziegler: The Court understands our position?

The Court: Yes. Well, on the motion of the United States the Court is going to have to exclude the general public from the courtroom while the prosecuting witness, which is the first witness to be called, I presume, is going to take the witness stand, except that officers of the law are not within the order; representatives of the press may remain here and personnel of the Court, the wife of the defendant and Mrs. Dalton and the prosecuting witness herself; all others will have to leave the courtroom.

Mr. Munson: Your Honor, Doctor Anderson, could he stay too?

The Court: Yes; Doctor Anderson may remain.

Reverend Lewis Hodgkins: The plaintiff is a member of my church, and I would like to request permission to stay.

The Court: You should speak through counsel. If you are aligned with one side or the other, you should consult with counsel and have counsel make the request for you.

Mr. Munson: Your Honor, I request that the complaining witness' brother be allowed to remain in the courtroom.

The Court: Very well.

Mr. Ziegler: If the Court please, as I understand it, then all witnesses can remain in the courtroom? [5]

The Court: Witnesses have not been excluded.

Mr. Gilmore: Then there is no exclusion order on witnesses?

The Court: No. Just the general public.

Mr. Gilmore: That leaves the problem of the Reverend.

The Court: He is a witness, is he?

Mr. Ziegler: Not that I know, your Honor. He has stated his position. Of course, he hasn't asked us to appear for him, but surely, so far as the defendant in this case is concerned, and I don't know how he stands with regard to it, we have no objection to his remaining in the courtroom.

The Court: I thought perhaps he was associated with one side or the other.

Mr. Ziegler: Not to my knowledge.

The Court: But, if he is not, then I would like to have him state his reasons why he thinks he should be allowed to remain.

Reverend Lewis Hodgkins: The family of the Lindseys and the Pawseys are members of our St. Elizabeth's Church, of which I am priest in charge, and it is of concern to me how the whole case goes.

Mr. Munson: Your Honor, I object to the Reverend's being here. I think that, if he has any concern with the spiritual side of the complaining witness and so forth, he [6] can do that at another time. I believe that the nature of the case would make her very uncomfortable with a reverend in the audience.

The Court: Well, what do you think about the statement made by the United States Attorney as

to the fact that the complaining witness might feel uncomfortable in your presence? Perhaps I should ask you this question. Have you taken sides in this case?

Reverend Lewis Hodgkins: I have tried to take neither one side nor the other.

The Court: Do you think you are absolutely neutral?

Reverend Lewis Hodgkins: I try to be.

The Court: Have you advised one side or the other?

Reverend Lewis Hodgkins: No, sir.

The Court: Well, it all depends then upon whether the prosecuting witness would feel uncomfortable and embarrassed in having him present.

Mr. Munson: Would you feel embarrassed in having the Reverend here, Loretta?

Loretta Lindsey: No.

The Court: You may remain then.

Reverend Lewis Hodgkins: Thank you.

Mr. Munson: For the record, your Honor, did you say that the press would not be excluded?

The Court: I have excluded the press—to make it [7] plainer perhaps I should use the word “excepted”. I have excepted the press from the exclusion order, representatives of the press, as well as officers of the court, officers of the law and personnel of the court.

Mr. Munson: Thank you, your Honor.

The Court: You may call your first witness.

Plaintiff's Case

LORETTA LINDSEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson): Now in a good loud voice, state your name. A. Loretta Lindsey.

Q. How old are you, Loretta?

A. Fifteen.

Q. When did you turn fifteen?

A. September 15th of this year.

Q. Where do you live?

A. Right now?

Q. Yes.

A. I live with the McMasters.

Q. And that is in Ketchikan? A. Yes.

Q. How long have you lived in Ketchikan? [8]

A. All my life.

Q. Now, you were adopted at a rather early age, weren't you, Loretta? A. Yes.

Q. In fact you were adopted twice, weren't you?

A. Yes.

Q. Who adopted you the first time?

A. Mr. and Mrs. Lawrence Pawsey.

Q. Mr. and Mrs. Lawrence Pawsey?

A. Yes.

Q. Are they related to you?

A. Yes. He is my real uncle. Uncle of—I mean, brother of my real father.

Q. Brother to your father. Who adopted you the second time?

(Testimony of Loretta Lindsey.)

A. Mr. and Mrs. Rollie Lindsey.

Q. Are you related to either one of them?

A. Yes. Mrs. Lindsey is my real aunt.

Q. She is your real aunt? A. Yes.

Q. And who is she related to, your mother or your father? A. My father.

Q. Related to your father. How old were you when you were adopted by the Lindseys?

A. I went there when I was seven. I never knew when I was adopted. [9]

Q. Oh, you mean you went to live with them before the legal adoption; is that it?

A. That is the way I understand it.

Q. That is the way they told you. You were seven when you went to live with them?

A. Yes.

Q. Where was Bob?

A. He was living at my Gram's but he went away to school.

Q. Where did he go; do you know?

A. I think it was Wrangell Institute.

Q. How old is Bob, or how much older is Bob than you? A. Two years.

Q. He is two years older. And when you went to live with Mr. and Mrs. Lindsey you were about seven; is that right? A. Yes.

Q. When did—now, after you started to live with the Lindseys, did anything unusual happen with you and Rollie? A. Yes.

Q. What was that?

A. Well, he started—well, I think it was before

(Testimony of Loretta Lindsey.)

I was adopted, but, when I lived there, I went to bed, and my Mom, Mrs. Lindsey, went out or was busy doing something, and he would come in and lay down by me and he would put his fingers and rub them up and down my leg, up by the upper part of my thighs. [10]

Q. And is that all he did?

A. Well, he would stick his finger up—I don't know what you would call it.

Q. You mean into your private parts?

A. Yes.

Q. He did that when you were seven?

A. Yes.

Q. While you were in bed; is that what you are saying? A. Yes.

Q. He would come into your bedroom and do that? A. Yes.

Q. Did he do anything else afterward?

A. No.

Q. In later years? A. Yes.

Q. What was that?

A. Well, he would stick his head between my legs and he would kind of move his tongue around and suck, I guess.

Q. Started doing that? How old were you then?

A. Well, I was between eight and seven or eight and nine.

Q. Between seven and eight or between eight and nine. Did he do that very often?

A. No; not too often.

Q. Rather infrequent? Sometimes?

(Testimony of Loretta Lindsey.)

A. Yes. [11]

Q. Then what was the next sexual adventure?

A. He would stick his penis in my mouth and make me suck, and then I would, oh, I don't know——

Q. Where did you learn that word—penis?

A. I just know what it means.

Q. You have known what that meant?

A. Yes.

Mr. Ziegler: I didn't get the answer, please.

Mr. Munson: She said, "yes," she knew what it meant.

Q. (By Mr. Munson): And what would happen?

A. Well, when he stuck his penis in my mouth he was small, kind of small, but, when I kept on sucking, it got bigger and bigger, and he finally let some stuff go into my mouth.

Q. And then what would you do?

A. Then I would have to get up, and he would get up and go to the bathroom, and then I would have to get up and go spit that stuff out and wash my teeth.

Q. Where would you spit it?

A. Into the toilet or into the sink while I was washing out my mouth.

Mr. Ziegler: I didn't get that. I hate to interrupt, your Honor, but I didn't get the answer. What was the answer?

Court Reporter: A. "Into the toilet or into the [12] sink while I was washing out my mouth."

(Testimony of Loretta Lindsey.)

A. Well, I know that it happened but I can't remember the dates.

Q. Well, when did—well, during this time did he ever say anything to you about what would happen if you told of these things?

A. Yes. He told me, if I told anybody, that I would get in a lot of trouble and I would be sent away.

Q. Well, what else did he tell you, if anything, to explain his conduct?

A. Well, he said the reason why he was doing that was to get me ready, if I ever got married or something and somebody else wanted to do the same thing to me, that I would know what it was and what would happen.

Q. Were there ever any threatening statements made to you? [15] A. No.

Q. Did he ever mention what would happen to you if you told your mother, for example, or the police or the authorities?

A. No. He just told me I would get in trouble.

Q. Well, do you remember when it was that, the first time, that Rollie had actual intercourse with you, what the date was and the time?

A. Well, when my Mom went to the hospital; that was when she had her first baby.

Q. When was that?

A. October 22, 1951.

Q. October 22nd? A. Yes.

Q. Do you recall that day? A. Yes.

(Testimony of Loretta Lindsey.)

Q. Tell us about it now, from your first recollection of what happened.

A. Well, my Mom went to the hospital the night before. He wasn't in when she went to the hospital, and so we went over to my Aunt Flo's to stay overnight, and he called up during the night to say he was in, and so the next morning before we went to school we went home, and he wasn't there—I went home, and he wasn't there, and I went up to the hospital, and she was in the delivery room [16] and she had the baby, and so that afternoon when I went home from school he was home and he told me I had to stay home from school and do the washing, and so I did.

Q. What time was that?

A. That was in the afternoon.

Q. About what time; do you remember?

A. Around 1:00 o'clock.

Q. Where was Bob?

A. Bob was home but he had to go back to school.

Q. You mean he had to go back at 1:00 for the afternoon classes? A. Yes.

Q. And who was home at 1:00 o'clock?

A. Nobody by my Dad and I.

Q. Then what happened?

A. Then I started washing clothes, and he came in the bathroom where I was and he asked me if I wanted it, and I told him, "No."

Q. Did you know what he meant?

A. Yes.

(Testimony of Loretta Lindsey.)

Q. Had he used that expression before?

A. Yes.

Q. If you wanted it? A. Yes.

Q. Or some words to that effect? [17]

A. He never actually said anything else but that.

Q. "It", referring to a sexual act of some sort?

A. Yes.

Q. Go on.

A. And so I told him, "No," and so a little while later he came in and he asked me if I wanted it, and I was in the kitchen then and I told him, "No," and he grabbed me around my arms and he made me go in the bedroom and took off—I took off my pants like he told me to do, and he put his head between my legs and started moving his tongue around and sucking and then he made me put his penis in my mouth to get it wet so that rubber thing could go on.

Q. What rubber thing?

A. I guess you call them "Trojans" or something. And then he pushed me further back on the bed and he started moving up and down.

Q. Could you feel that? A. Yes.

Q. Was he inside of you? A. Yes.

Q. Could you definitely feel that?

A. Yes. It took him quite a while, and all of a sudden it just went in.

Q. Did it hurt? [18] A. Yes.

Q. Did you say anything to him?

A. No.

Q. Did you make any outcry? A. No.

(Testimony of Loretta Lindsey.)

Q. Well, is that all he did?

A. That is all he did then.

Q. That day? A. Yes.

Q. When was the next date that you can remember?

A. Well, it was—the next date I can remember was when she went to the hospital again to have her second baby.

Q. Well, in between those two dates did he ever have intercourse with you and commit these sodomy acts on you? A. Yes.

Q. How often?

A. Every time he was home.

Q. You mean every chance he got?

A. Yes.

Q. Well, how would he get alone with you?

A. You mean besides this?

Mr. Ziegler: That plane was running. Excuse me, Mr. Munson. I didn't hear that question.

Mr. Munson: I just asked her how he would be alone with her. [19]

A. What do you mean?

Q. (By Mr. Munson): Well, when would these acts of intercourse take place?

A. Well, it could be at night when my mother was sleeping, or it even could be when she was cooking supper.

Q. And when else would this happen at other times?

A. When she wasn't home and if she went to a meeting or something.

(Testimony of Loretta Lindsey.)

Q. Did Victoria go out in the evening quite a lot?

A. She only goes out on certain nights when they are having Bingo or Vets' meeting or visiting somebody.

Q. Did she go regularly to those?

A. Yes; quite regularly.

Q. Did Rollie ever have intercourse with you in the morning? A. Yes.

Q. And do you distinctly recall that between these two dates, October 22, 1951, and the date of the second child of Victoria's, that he had intercourse with you?

Mr. Ziegler: Now, if the Court please, we haven't objected, but I think that is too much leading. I realize that it is a witness, that some leading questions are allowed, but I think that is certainly leading.

Mr. Munson: I don't know how else to phrase it.

The Court: Will you repeat that question to me?

Court Reporter: Q. "And do you distinctly recall [20] that between these two dates, October 22, 1951, and the date of the second child of Victoria's, that he had intercourse with you?"

The Court: The objection is overruled. He is asking her whether they had intercourse during a certain period. It may be answered yes or no. You may answer the question.

A. Yes, he did.

Q. And you distinctly remember those?

A. I don't remember them but I know he did

(Testimony of Loretta Lindsey.)

because I know he would always—sometimes I would hear him come upstairs and sometimes I wouldn't, but, whenever he did, he would always go in to see if my brother was awake or something.

Q. You mean in the morning? A. Yes.

Q. Well, when is the next specific date that you recall?

A. October—I have already given you October 23rd, haven't I, 1952?

Q. I am sorry. I forgot it. And how do you remember that date?

A. Well, like I said, my Mom went to the hospital to have her second baby.

Q. Do you recall what happened that day?

A. Well, she had the baby at night, I know. Mrs. Smith came over—and Janice—it was when she was having my little sister—and came over to help us with Randy and things [21] like that, and she had a baby at nighttime, and, when he got home, I was in the front room doing my studying, and he came in and asked me if I wanted it, and I told him, "No," and so, since he had had intercourse with me before, all these other times, I knew how hard it was to refuse him because he would never give up on the subject, so I knew it would be easier to let him do it than to fight him off.

Q. Well, what happened?

A. Well, he took me in there and, I was laying down on the bed, and he put his head between my legs again and started moving his tongue around and using the suction, and then afterwards I would

(Testimony of Loretta Lindsey.)

have to—he would have to—I would have to take his penis in my mouth and get it all wet so he could stick that rubber thing on it, and then he would get on top of me and have intercourse with me.

Q. Did he—was he successful in having intercourse with you that time? A. Yes.

Q. Did you feel him inside you? A. Yes.

Q. Did you know he was inside you?

A. Yes.

Q. When was the next date that you can remember?

A. Well, the next date I can remember is when she went to [22] the hospital to have her next baby. That was February 27th of this year.

Q. Now, in between the time you just told about and the time now that you are going to tell about, was there—did he have intercourse with you during those periods, those dates, October 23, 1952, and February 27, 1954?

A. Yes. But I can't remember because whenever he would come home, just about, he would do those things to me.

Q. I am not asking you if you remember the specific dates. I am just asking you if he had intercourse with you or if he did any of these things, like having you put his penis in your mouth or put his tongue on your private parts, between those two dates? A. Yes, he did.

Q. That was a regular routine?

Mr. Ziegler: Now, I object to that question, if the Court please.

(Testimony of Loretta Lindsey.)

Mr. Munson: Your Honor, I believe that in a case——

Mr. Ziegler: I know, but the statement that it was a regular routine, I think the witness should testify rather than counsel.

The Court: Well, you might ask her how regular or how frequent it was.

Q. (By Mr. Munson): How often did this occur? A. When he was home. [23]

Q. I mean, you have already said that it occurred whenever he got an opportunity or when he was home, but I want to know approximately—was it once every two weeks, or once a week, or twice a week—I want to know what the frequency of it was?

A. Sometimes, if he was home over a period of a week or two weeks, it would be two or three times, but it might not be what he did to me on those specific dates I gave.

Q. You mean, he might not perform all three?

A. Yes.

Q. I realize that, but I just wondered how often the frequency of the contact was with you?

A. Oh, about, if he was home for that length of time, it could be two or three times.

Q. Two or three times a week, you mean?

A. Yes; or else sometimes it could be two times in one day.

Q. Tell us about this 27th of February incident of this year.

A. Well, she went to the hospital and had a

(Testimony of Loretta Lindsey.)

baby, and that night I was doing my book report and I went—he was in bed, and I went in there because I knew he read the book, so I went in and I asked him if he would tell me about the story in it because the next day——

Q. What was the name of the story?

A. "Seventeen."

Q. Who was the author? [24]

A. Booth Tarkington, I think; yes, Booth Tarkington.

Q. You were writing a book report, you say?

A. Yes.

Q. Was Bob home that night?

A. No, he wasn't. I can't remember whether Mr. Lindsey sent him out for something or sent him to the show or what, but Bob wasn't home.

Q. He wasn't there that evening. Well, what happened? You went in to ask Mr. Lindsey what the book was about?

A. Yes; because had read the story. And so I went in there and I was sitting on the vanity stool, and he was way over in the bed, on the other side of the bed, and so I went in and asked him, and he started telling me about it and he got up out of the bed and he went to the front room and pulled down the blinds and locked the front door and came to the back door and locked that and then he came back in the bedroom. By then I knew what was going to happen when he locked the doors and pulled down the shades and so I asked him to tell

(Testimony of Loretta Lindsey.)

me the rest of the story, and so he kneeled down in front of me and put his fingers——

Q. How was he dressed?

A. He had on his bathrobe. And he put his fingers up my leg and put them inside my private part and started moving it around and then he said, "Do you want it?" And then I [25] wanted to say, "No," but, I don't know, he just had a way about him of getting what he wanted when he wanted it, and so I didn't put up any fight or argument about it, so he did the same thing to me like he did before when he put his head between my legs and started moving his tongue around, and then he put his penis in my mouth and put that rubber thing on it and then he laid there for a while, moving up and down, and then after a while he would get off and go in the bathroom.

Q. Was he successful in having intercourse with you? A. Yes.

Q. Could you feel him inside of you?

A. Yes.

Q. Tell me, Loretta, were you ever placed on restriction, told you couldn't go out, or something like that? A. Yes.

Q. By Mr. Lindsey? A. Yes.

Q. Was the restriction ever lifted for any reason? A. Yes, it was.

Q. What was the reason?

A. Well, either I would behave myself for a while or else sometimes, when I never even thought

(Testimony of Loretta Lindsey.)

of it, after he had intercourse with me or something like that, he would let the restrictions go.

Mr. Ziegler: What was the answer? I never heard it, please. What did she say?

Court Reporter: A. "Well, either I would behave myself for a while or else sometimes, when I never even thought of it, after he had intercourse with me or something like that, he would let the restrictions go."

Q. (By Mr. Munson): You remember telling me all of this six months ago, do you, Loretta?

A. Yes.

Q. What induced you to report Mr. Lindsey to the authorities?

A. Well, I had been letting him do those things to me, I guess you would say, as often as he wanted to, and he would get mad and sometimes he would hit me, and then I knew I just couldn't do it any longer and I knew it was wrong.

Mr. Ziegler: Could I hear that answer read, please? I couldn't hear it from here.

Court Reporter: A. "Well, I had been letting him do those things to me, I guess you would say, as often as he wanted to, and he would get mad and sometimes he would hit me, and then I knew I just couldn't do it any longer and I knew it was wrong."

Q. (By Mr. Munson): When was the last time; do you remember when the last time was that he had intercourse with you?

A. I don't know the exact date but I know it was around the [27] last part of March.

(Testimony of Loretta Lindsey.)

Q. Around the end of March? A. Yes.

Q. Around March 30th?

A. Around the end of March.

Q. Did you tell anybody about it?

A. Well, not at the time, but a few days later I told my girl friend what I was going to do and what Rollie had done to me. I told her I was going to go to the authorities, and the people I was working for, the Riewolds, I told them about it.

Q. You are referring to Don Riewold and his wife? A. Yes.

Q. Who did you tell; which one of the two did you tell?

A. Well, I told Don, but he told me—when I went over there I made up a story that I was just going to run away and not say anything and not even bring this up at all.

Q. Had you run away from home before?

A. Yes.

Q. For what reason?

A. Well, because I didn't like it there.

Q. Do you have any hostility toward Victoria, your aunt? A. No.

Q. How do you feel toward her, or how did you feel toward her? [28] A. (Crying.)

Q. Have a drink of water, Loretta.

The Court: Recess for five minutes.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Loretta Lindsey resumed the witness

(Testimony of Loretta Lindsey.)

stand, and the direct examination by Mr. Munson was continued as follows:

Q. When we left off, you just said that on March 30th was the last time that you recall that Mr. Lindsey had sexual intercourse with you and that after that, a couple days after that, you went over to the Riewolds' house and told them about it. Did you do anything else while you were there?

A. Yes. I phoned my mother.

Q. Do you remember what day that was; what day of the week, I mean, that that was?

A. I am pretty sure it was a Saturday.

Q. Could it have been Saturday, April 3rd?

A. It could have been but——

Q. Well, did—after that time did Rollie make any other advance at you? Were there any other advances made?

A. Yes, he did, but he wasn't successful.

Q. Well, when was that?

A. Well, it was—— [29]

Q. As nearly as you can remember?

A. It was the next week, around the next week. And he tried——

Q. You mean the next Saturday, or sometime during the week?

A. It was within a week.

Q. And what did you do?

A. Well, I was sitting on the couch, and my Mom went out, and I thought he was asleep, so I just sat there reading some funny books because

(Testimony of Loretta Lindsey.)

I was supposed to go over to Don and Ann's, over to the Riewolds', to get paid for the work I had done, and so I was waiting for the time to come that I had to go over there, and just about five minutes after she walked out of the door he turned over and he got up and went into the kitchen and had a glass of water or went in there for something and he came back and he sat down, kneeled down, in front of me and asked me if I wanted it, and I told him, "No," and he tried to put his hand up my skirt, and I wouldn't let him and I started crying, and I tried that before, and he always got mad at me and he hit me, and so I went into the—after that he didn't try anything, so I went into the bathroom and washed up and I told him I had to go over to Don and Ann's and get paid, and he said, "O.K., but be right back," and so I went over there and I told them and I phoned my Mom up and told her what he tried.

Q. You told "them" or "him"? I didn't quite hear you. [30] A. I told him.

Q. "Him", meaning Don Riewold?

A. Don Riewold. And I called up my Mom down in Seattle and I told her what he tried, and she was pretty mad about it, and then Rollie called up after a long period of time, and he said, "Is Loretta there?" And Ann told him, "Yes; but I haven't paid her yet because I have to get my check cashed." And so, when I got home, he said, "What are you trying to prove? I know it couldn't have taken that long to get paid."

(Testimony of Loretta Lindsey.)

Mr. Ziegler: I didn't get that answer. "What are you trying to prove" and what?

The Court: "I know it didn't take that long to get paid."

Q. (By Mr. Munson): Did you tell anybody else?

A. Yes. After I told Don and Ann, I told my brother Bob about it.

Q. Anybody else?

A. I told a lot of people.

Q. Who did you tell? You told about what had been going on with you and Rollie?

A. Yes.

Q. Do you remember?

A. I told my aunt.

Q. You mean, Florence Dalton? [31]

A. Yes. And my uncle, her husband, and my other uncle and my grandmother and my real father and my Uncle Patty and my brother Gary was down there, and so he heard it, and I told Arleen Field and I told Mr. Davidson, and——

Q. Mr. Davidson, the attorney, or the minister?

A. Attorney. And so then I told Fred Bryant and Reverend Grissett and I told you.

Q. And that is when this case began?

A. Yes.

Q. Well, after you had been up talking to me and other officials, where did you go?

A. Well, I——

Q. I mean, had you left the Lindseys' home at that time? A. Yes.

(Testimony of Loretta Lindsey.)

Q. And where were you staying?

A. At my grandmother's house.

Q. That is where you stayed after you left the Lindseys' house? A. Yes.

Q. And after you were up in my office, were you placed in another house? A. Yes.

Q. Where was that?

A. Out the road. They call it the Happy Kids Home, I guess.

Q. And then did you stay there all the time?

A. No. Right after I went before something here, I went to Wrangell to live with Mr. and Mrs. Krepps.

Q. Now, how long were you over in Wrangell?

A. Just about four months or so.

Q. Did you like it there? A. No.

Q. Did you want to get back to Ketchikan?

A. Yes.

Q. Well, was there any particular reason for wanting to come back to Ketchikan?

A. After I had been there for a while I didn't like it, and as time went on I missed the kids and my Mom.

Q. You missed what kids?

A. The Lindseys.

Q. Do they have three children? A. Yes.

Q. The younger ones. Did you spend a lot of your time taking care of those children?

A. Yes, I did.

Q. How do you feel towards the children?

A. I like them a lot.

(Testimony of Loretta Lindsey.)

Q. Did you ever do anything to hurt them?

A. No.

Q. You say you missed your young nieces and nephews or brothers and sisters by adoption. What did you do? Did [33] you make an attempt to get back here?

A. Yes, I did.

Q. Did you write Mr. Lindsey?

A. Yes, I did.

Q. And what did you tell him?

A. I told him that I was coming back here to drop all the charges that I made because they weren't true, and I got here before the letter did.

Q. How did you get back here?

A. Well, the only thing I could think of was, I accused Mr. Krepps of having had intercourse with me when he hadn't, but that was the only thing I could think of to come back.

Mr. Ziegler: Pardon me. I didn't get that.

The Court: "That was the only thing I could think of to get back."

Mr. Ziegler: Did she say what she did think of?

The Court: She hasn't said that yet.

Mr. Munson: She said that she accused Jack Krepps of having intercourse.

The Court: Well, she said that before.

Mr. Ziegler: I didn't hear that. That is the part I was asking about.

The Court: Oh.

Q. (By Mr. Munson): You said that wasn't true?

A. Yes. [34]

Q. Why did you say a thing like that?

(Testimony of Loretta Lindsey.)

A. Well, because that was the only way I could think of I could get back here to my Mom and the kids.

Q. Well, did you tell them that it wasn't true?

A. My Mom and Dad?

Q. I mean, Jack and Mrs. Krepps.

A. Yes, I did.

Q. What was your accusation; what did you say, and who did you say it to?

A. I told it to Judy.

Q. And what did you say?

Mr. Ziegler: Told it to whom?

A. Mrs. Krepps. And I told her that—well, I made up a big story—that I wouldn't be surprised if I was pregnant, and she said, "Why?" And I said, "Oh, I don't know. I just have a feeling." And she said, "Do I know who did it?" And I said, "Yes." And she said, "How well do I knew that person?" And I said, "Pretty well." And she went into the house and called up Jack and had him come home.

Mr. Ziegler: Jack Krepps, do you mean?

A. Yes.

Mr. Ziegler: Pardon me for interrupting.

Q. (By Mr. Munson): Now, this was an attempt, you say, on your part to get shipped back to Ketchikan; is that the [35] idea?

A. Yes.

Q. What in fact did happen?

A. I did get shipped back to Ketchikan, as you

(Testimony of Loretta Lindsey.)

call it, and as soon as I got back I went up to see my Mom and Dad and the kids.

Q. And when you came back here, what did you tell Mr. Lindsey?

A. Well, when I came back, he wouldn't let me in the house, and I asked him if they had got my letter, and he said, "No," and so I told him I had written saying I was dropping all the charges, and just as soon as I said that he opened the door, and a great big smile on his face, and he asked me why I had done such a thing, and I told him that I didn't know, and then he called up the attorneys, and he started eating breakfast after he called them up, and I was playing——

Q. Who was there at that time?

A. My mother and the three kids. The kids were still in bed, and so I went in there and got them and——

Q. Where did you go?

A. I started playing with them.

Q. No; I don't mean the kids. I mean, where did you go with Mr. Lindsey?

A. Down to Mr. Ziegler's office. [36]

Q. Now, when you got down to Mr. Ziegler's office, who was there?

A. Young Ziegler, and my father, and his secretary, and me.

Q. Anybody else?

A. Not that I can remember.

Q. Was Mr. Lindsey there?

A. Yes, he was.

(Testimony of Loretta Lindsey.)

Q. You didn't mention his name?

A. Yes, I did.

The Court: She referred to him as "father".

Q. (By Mr. Munson): How many people were talking?

A. Well, all of us; I mean except for the stenographer, or whatever you call her.

Q. Did young Mr. Ziegler ask you a question?

A. Yes.

Q. And then would someone else besides you have a few words to make before you made your answer?

A. Yes.

Q. Who was that other person?

A. My Dad.

Q. And what would he do?

A. Well, he would say something, and then I would answer the question.

Q. You mean, you would answer it substantially the way he suggested in his statement? [37]

Mr. Ziegler: Now, that is leading, if the Court please.

Mr. Munson: I am trying to sum up what she just said.

The Court: Well, you may ask her if anybody suggested the answers that she should give.

Q. (By Mr. Munson): Did anyone suggest the answers that you should give?

A. Some of them; yes.

Q. Now, on your way down to the attorney's office, who did you go with down to the attorney's office?

A. Just my father.

(Testimony of Loretta Lindsey.)

Q. Did he have anything to say along the way?

A. Yes, he did. He asked me why I told all that and he said, "I thought you liked it," and I just didn't know what to say.

Mr. Ziegler: What was the answer, if the Court please? I hate to interrupt, but I can't hear too good over here.

The Court: Maybe the table ought to be moved.

Mr. Ziegler: Will the reporter kindly read the answer?

The Court: That is the last answer?

Mr. Ziegler: Yes, your Honor.

Court Reporter: Do you want the question?

Mr. Ziegler: Yes. [38]

Court Reporter: Q. "Did he have anything to say along the way?" A. "Yes, he did. He asked me why I told all that and he said, "I thought you liked it," and I just didn't know what to say."

Q. (By Mr. Munson): You said that kind of fast, Loretta. He said to you—is this just what you said now? He said to you, "Why did you tell all that? I thought you liked it." A. Yes.

Q. And you just didn't answer him?

A. No.

Q. You said nothing?

A. I didn't know what to think.

Q. Well, Mr. Lindsay knew that you had been examined by a doctor, didn't he?

A. Yes, he did.

Q. Did he have any suggestions to make as to how to explain that?

(Testimony of Loretta Lindsey.)

A. Well, a few days later, when I went up to the house to see the kids, he—I asked him what should I do at this thing if they asked me because I told him the doctor's examination shows that I have had intercourse with somebody, and he said, "Well, just tell them that you stuck a banana or something up you."

Q. You say Victoria was there?

A. And my grandmother. [39]

Q. And Mrs. R. D. Pawsey? A. Yes.

Q. You said you told various members of your family about six months ago, in April, about these things. What was the reaction? What did they say?

A. Well, my aunt Flo, Mrs. Dalton, was, I guess you would put it, sick when I told her this. She felt sick and she looked it, and my uncle, Lawrence Pawsey, just told me not to say anything about it. He said, "That is an awful strong thing to say about anybody unless you have proof."

Q. Well, what was Victoria's reaction?

A. She didn't—she just asked me why I didn't tell her before.

Q. How about your grandmother?

A. Well, as soon as I told my grandmother, she took me home and told me to get my clothes, and before I got my clothes she made me tell my Mom what I just said, and then we left.

Q. You mean, your grandmother took you right out of the house? A. Yes.

Q. And you were living with—and that is the grandmother, Mrs. R. D. Pawsey, that you were

(Testimony of Loretta Lindsey.)

living with when you came down to my office?

A. Yes.

Q. What did the other members of the family say?

A. I told my real dad about it and I asked him if he believed [40] me, and he said, yes, he did.

Mr. Ziegler: If the Court please, I move that that be stricken, her real dad, what her real dad said, because I understand he is dead at the present time.

Mr. Munson: He is.

Mr. Ziegler: And, furthermore, it would be incompetent evidence anyway, as to what the father said.

The Court: Yes. It will be stricken.

Mr. Ziegler: And the jury asked to disregard it.

The Court: And the jury is instructed to disregard it. That much of it, as to what her real father said in response to what she said, is stricken. The fact that she reported to him is not stricken.

Q. (By Mr. Munson): Now, a little earlier, Loretta, when you were telling me about your younger girlhood days when Mr. Lindsey was having these sexual relations with you by means of your mouth, you said that you got rid of the stuff by going to the bathroom but that later on you did something else. What was that something else?

A. Well, we had this cotton that you use to stuff chairs or something, and I would spit it out in that and put it in some boxes that was in the closet, behind the boxes.

(Testimony of Loretta Lindsey.)

Q. Did you ever show that?

A. Yes, I did. I showed it to my mother and grandmother, and I kept it just—— [41]

Q. Did you show it to anyone else?

A. My brother Bob saw it; yes.

Q. You showed it to Bob? A. Yes.

Q. Did you ever look for it after this——

A. Well, when I came home——

Q. Came home from where?

A. Wrangell. I went upstairs and just got inside my door and I saw that everything had been just stripped, meaning that everything was moved, and gone through everything.

Q. Was that cotton gone?

A. Yes, it was.

Q. Your room was stripped, did you say?

A. Well, searched thoroughly.

The Court: Did you mean that later on you did something else, something different?

A. Yes, I did.

The Court: What was it? What was it that you did that was different?

A. Well, before I put that stuff in the sink or in the toilet, but then I was upstairs or something and I had to put it on that cotton.

Q. (By Mr. Munsey): Well, Loretta, where is your bedroom in relation to the bathroom in the Lindsey house?

A. My bedroom is upstairs, and the bathroom, you have to go [42] down the hall and down the stairs, and into the hall upstairs, and then into the

(Testimony of Loretta Lindsey.)

kitchen and just from the kitchen to the bathroom.

Q. In other words, it is all the way downstairs in another part of the house? A. Yes.

Q. Well, Loretta, just for clarification now, when you came back from Wrangell you testified that you wanted to drop everything? A. Yes.

Q. And you said that it was because of your feeling towards the children of the Lindseys and Victoria? A. Yes.

Q. What I would like to know is what changed your mind?

A. Well, because my Dad, Mr. Lindsey, told me he didn't know if he could control himself after I got back, and I remember one time I went up there——

Q. Went up where, Loretta?

A. To the Lindseys' house. And my Mom and Gram weren't home, and just Janice and Pat were there, my brother and sister.

Q. Well, did you know that they were gone when you went up there?

A. Well, I met them, but she said that Janice was there, and so I went up there, and I was sitting on the couch, and he was sitting on the chair, and I was talking, and Janice [43] fell asleep, and so I put her to bed.

Q. Loretta, at this point were you and the Lindseys convinced that the case was over with?

A. Yes. And so I put Janice to bed, and I came back and I sat on the chair next to the door, and he was sitting on the armchair and he asked me

(Testimony of Loretta Lindsey.)

if I wanted it, and then I knew I had to get out of that house before he tried anything like that again, and so just then my grandmother came home and said he was wanted to carry up some groceries or something.

Q. Well, after you came back here to Ketchikan, did I or anybody in the office ever make any attempt to contact you about this?

A. No. I came up here of my own free will.

Q. And what was the reason for your coming up to see me after this return to Ketchikan from Wrangell?

A. Well, because I had made that story to the attorneys, and which wasn't true.

Q. You mean the statement? A. Yes.

Q. That you made to the Zieglers?

A. Yes. It wasn't true, and I knew that if Rollie did try anything with me again, and I told the attorneys it wasn't true, and that I would be in a lot of trouble, and that, if I ever told them anything else again, they wouldn't [44] believe me.

Q. Did I ever make any statements about lying under oath or threats against you? A. No.

Q. What did I tell you?

A. You told me to tell the truth.

Q. What did I tell you the first time I saw you?

A. To be sure I was telling the truth.

Q. What have I always told you every time we have talked about this case?

Mr. Ziegler: Now, if the Court please——

A. To tell the whole truth.

(Testimony of Loretta Lindsey.)

Mr. Ziegler: Just pardon me a minute, if the Court please. The District Attorney is not on trial here, and there is no accusation or charge being made that Mr. Munson has done anything at all in this case that wasn't proper. I don't think the questions are proper.

The Court: Well, the questions are hardly proper without there being some implication that she is not telling the truth. I think on redirect examination, if there are any such insinuations or implications, why, it would be proper to go into what you told her.

Mr. Munson: No further direct examination.

The Court: What about the seventh count? Isn't she a witness to that? [45]

Mr. Munson: I thought I covered that, your Honor.

The Court: I don't remember it. If you did, if you have, why, never mind.

Mr. Munson: Your Honor, the testimony that was sought to be elicited from this witness regarding the bringing of this witness up to the office of Bob and Mr. Ziegler, Sr., and the statement about how she would explain the fact that she was not a virgin.

The Court: You rely on that?

Mr. Munson: That and the fact that she has testified that he was suggesting some of the answers that appear in this affidavit.

Mr. Ziegler: Pardon me. With the plane going, I couldn't hear you, Mr. Munson.

(Testimony of Loretta Lindsey.)

Mr. Munson: And the fact that Mr. Lindsey was suggesting answers for her to give in this affidavit which she has later characterized as being untrue, all going to show influence.

Mr. Ziegler: I understand then, Mr. Munson, that you rely on supporting the seventh count in the indictment on the statements just made?

Mr. Munson: Yes.

Mr. Ziegler: And do you have any further testimony, may I inquire, on that point from other witnesses?

Mr. Munson: No other direct witnesses. [46]

Mr. Ziegler: If the Court please, I would like to make a motion at this time and ask that the jury be excused.

The Court: Well, if it is that motion you wish to make, why, I am going to deny it, so we won't have to excuse the jury.

Mr. Ziegler: Well, the Court hasn't heard my motion.

The Court: Well, I say, if it is that motion that you are going to make, why, the Court will deny it, so we won't have to excuse the jury.

Mr. Ziegler: Well, the Court hasn't heard the basis of my motion.

The Court: Well, is it going to be insufficiency of evidence?

Mr. Ziegler: No, your Honor. The motion is simply this, your Honor, that the defendant is accused of endeavoring to influence a witness who was

(Testimony of Loretta Lindsey.)

then duly subpoenaed before the grand jury, and there is no evidence whatsoever produced.

The Court: Well, it is the sufficiency of the evidence then.

Mr. Ziegler: Well, of course if there is no evidence produced that she wasn't under subpoena at this time that the seventh count was made——

The Court: Well, I don't remember what the evidence is on that.

Mr. Ziegler: There is no evidence, your Honor, no [47] evidence that I recall. The record of course and the file will show.

Mr. Munson: Your Honor, I request permission to reopen the direct to ask the witness whether she was then under——

Mr. Ziegler: I don't think you need to do that. The Court's file will show the date she was subpoenaed to appear before the grand jury.

The Court: Is that an element of the offense?

Mr. Ziegler: Yes, it is, your Honor.

The Court: But is it an element of the offense under the law, not the indictment?

Mr. Ziegler: Yes, I think so; the statute so provides—any witness under subpoena.

Mr. Munson: Well, with due respect to defense counsel, it is not an element under the law.

The Court: Well, then we don't want to bother with it. If it isn't an element under the law, it need not be proven here.

Mr. Ziegler: If the Court please, it is my under-

(Testimony of Loretta Lindsey.)

standing of the law, your Honor. If I am mistaken, then I am mistaken.

Mr. Munson: That allegation is usually made to show the fact.

The Court: You can't add an element by putting it [48] in the indictment. That is plain enough. Well, the motion is denied. It is not an element under the law. Proceed.

Mr. Munson: Your Honor, in any event, she was subpoenaed on the 26th day of April, 1954.

Mr. Ziegler: Before the grand jury?

The Court: Well, what is the use of discussing this? I have ruled it is not an element under the law. It is just superfluous. There is no use of taking the time up of the Court. Let's go on now with this case.

Cross Examination

Q. (By Mr. Ziegler): Loretta, Mr. Munson asked you, when you came back from Wrangell and after you had made this statement you testified to, if he said anything to you about what kind of testimony you should give, and you said no; that is correct? A. Yes.

Q. I will ask you did Miss Seliotes of the Welfare Department talk to you about it?

A. About that?

Q. Yes; about this statement.

A. No. She didn't know anything about it until I told her.

Q. And, when you told her, did you tell her what the statement was? [49]

(Testimony of Loretta Lindsey.)

A. No. I just told her that whatever I said before wasn't the truth.

Q. I see. And then what did she say to you?

A. She asked me why I did that.

Q. And is that all?

A. Yes; and she said she thought I made a mistake by doing it.

Q. I see. Did she tell you, "Which would you rather do, see your father go to jail or you be charged with perjury?"

A. No.

Q. She didn't tell you that?

A. No.

Q. Loretta, didn't you tell Mr. and Mrs. Lindsey that Miss Seliotes told you that? Now, think.

A. No, she didn't.

Q. Mrs. Pawsey—didn't you tell Mrs. Pawsey and Mrs. Lindsey that Miss Seliotes said to you, "Now, Loretta, would you rather see your father go to jail, or would you rather be charged with perjury?"

A. No, she didn't; but I thought that.

Q. You made that up, did you?

A. I thought it. I didn't tell anybody about it.

Q. Oh. Now, what did you think?

A. I thought, well, would it be worth having my father go [50] to prison or me being charged with perjury. At the time I thought perjury would be all right.

Q. I see. And you did tell Mrs. Pawsey and Mrs. Lindsey then that Miss Seliotes told you that?

A. No.

(Testimony of Loretta Lindsey.)

Q. You didn't tell them that? A. No.

Q. Are you sure of that? A. Yep.

Q. Did you say "Yes" or "Yep" or what?

A. Yes.

Q. Now, Loretta, I think you testified in answer to Mr. Munson's question about your feeling for Mrs. Lindsey—you call her Mom? A. Yes.

Q. And what did you say about that? What was your feeling towards her?

A. I like her very much.

Q. And you always did?

A. And I still do.

Q. And you still do. Is this your writing, Loretta? A. Yes.

Q. And do you know when you wrote it? Can you tell from it when you wrote it?

A. It looks like April. [51]

Q. Do you know what year it is?

A. No, I couldn't.

Q. Was that about the time that this charge was filed against Mr. Lindsey? A. No.

Q. It wasn't. When did you—do you remember the time of the month when you first went to the Riewolds' and other people and told them what you said here? Was it in April? Was it late April or the middle of April?

A. The first part of April.

Q. What was it?

A. I think around the first part of April.

The Court: I think you better stand back. You

(Testimony of Loretta Lindsey.)

are holding this thing in a conversational tone that no juror could hear back there.

Mr. Ziegler: All right, your Honor.

Q. (By Mr. Ziegler): This has no year on this date. It is dated April 27th, apparently 6:00 o'clock; is that correct?

A. I don't even know if I put that on.

Q. All right. Well, now, what did you say in that card? Read it.

Mr. Munson: I would like to see that if I could.

Mr. Ziegler: Yes. I was going to introduce it in evidence. (Handing document to Mr. Munson.) She has stated [52] that this is her writing, your Honor, and I will ask to have it introduced in evidence.

The Court: Well, if there is no objection, it may be admitted.

Mr. Munson: I object on the ground, your Honor, that it doesn't mean anything.

The Court: Let's see it.

(Mr. Munson handed the document to the Court.)

Mr. Ziegler: I am going to have her read it and have her explain the language.

Mr. Munson: Well, I don't know under what possible hearsay exception that could come in under, and I object to it as hearsay.

Mr. Ziegler: This is cross examination on the question of her feelings toward her mother.

The Court: I don't see what—I can't even make out the last two words.

(Testimony of Loretta Lindsey.)

Mr. Ziegler: Maybe the witness can, your Honor. It is her writing.

The Court: Well, the last two words would have to make it relevant or else it is certainly meaningless.

Mr. Ziegler: That is the purpose of it; that is the reason I——

Mr. Munson: Your Honor, I object on another ground, that he is trying to introduce into evidence something on [53] cross examination as substantive evidence, and I don't believe he can do that.

The Court: It is part of the cross examination introduced. The only question is whether it is intelligible. It isn't intelligible to me. Now, if you want to try to make it intelligible with the witness, why, you may do so.

Q. (By Mr. Ziegler): Loretta, will you read that and explain what you say there with reference to your mother? Take your time and see if you can tell the jury what you say there.

A. This wasn't written this year.

Q. How is that?

A. This wasn't written this year.

Q. Well, I understand that, and——

Mr. Munson: Well, your Honor, if that wasn't written this year, I object on the ground that it is pure hearsay and admissible under no possible exception to the hearsay rule.

The Court: Well, it all depends whether it was written since this charge was brought.

(Testimony of Loretta Lindsey.)

Mr. Munson: This charge was brought this year, your Honor.

The Court: Then I will have to sustain the objection.

Mr. Ziegler: If the Court please, the purpose of this writing, as I understand it—— [54]

Mr. Munson: I object to arguing after the Court rules, your Honor.

Mr. Ziegler: Well, if the Court will listen to my reasoning for it——

The Court: Well, you may state your purpose so long as stating the purpose will not be prejudicial.

Mr. Ziegler: The testimony is, as I understand her to say, that she loves her mother and always has. Now, the question is—it doesn't have anything to do with whether it is this year or not, if she made contradictory statements with respect to her feeling toward her mother.

The Court: But it is an immaterial matter. Her mother is not on trial here. So, it is an attempted impeachment on an immaterial matter.

Mr. Ziegler: If the Court rules in that manner——

The Court: Yes.

Mr. Ziegler: ——for the time being we will not pursue it any further. I think, however, your Honor, at least I think it will become pertinent later on.

The Court: Well, you may try to get it in later on if you think you can make it competent for some purpose.

(Testimony of Loretta Lindsey.)

Q. (By Mr. Ziegler): Now, Loretta, after the preliminary hearing was held here last May—I forget the date——

Mr. Ziegler: What date does the record show; do you recall (addressing Mr. Munson)? [55]

The Court: You don't have to have the exact date, if she remembers the occasion.

Mr. Ziegler: Well, if she knows, it was the preliminary hearing.

Q. (By Mr. Ziegler): Do you remember the time you testified in the court here last May before you went to Wrangell? A. Yes.

Q. After that hearing was held, you went to Wrangell, didn't you? A. Yes.

Q. And you were placed in the custody of Mr. Krepps, the Marshal there, by the Welfare Department? A. Him and his wife.

Q. How is that?

A. I said, in his and his wife's custody.

Q. Now, just before the hearing, you know, when they had the hearing downstairs, were you in the hospital here? A. Yes.

Q. And what did—what were you there for?

A. Well, they thought it was appendicitis, but it wasn't.

It was just nerves.

The Court: The jury is instructed to disregard that. It is wholly without any probative weight or relevancy.

Q. (By Mr. Ziegler): Now, when did you leave Wrangell to come back to Ketchikan, Loretta, or

(Testimony of Loretta Lindsey.)

just about? Do you [56] know the date you got back here?

A. It was just either the last week or the last couple of weeks in August.

Q. I see. And when did you, after you returned to Ketchikan, when did you go to the home of Mr. and Mrs. Lindsey?

A. The day after I got back.

Q. The day after you got back. And was that the same day that you went up to the law office of Robert Ziegler here? A. Yes.

Q. All right. Now, how long were you in the house there with Mr. and Mrs. Lindsey before you went to the office?

A. Oh, ten or fifteen minutes.

Q. I see. Then did you and Mr. Lindsey go up to the office together? A. Yes.

Q. And about what time in the morning was that, or what time of the day?

A. It was in the morning.

Q. It was in the morning. And can you tell the jury how long you were there making the statement? A. I really don't know.

Q. You don't have any idea? A. No.

Q. Well, now, on the way up, now, just tell me what Mr. Lindsey said again. [57]

A. Well, he told me he just couldn't see how I could have said that because he thought I liked it.

Q. He told you what? I didn't hear you.

Mr. Munson: Would the reporter read the answer back please?

(Testimony of Loretta Lindsey.)

Court Reporter: A. "Well, he told me he just couldn't see how I could have said that because he thought I liked it."

Q. (By Mr. Ziegler): Now, do you know what he was referring to when he said that?

A. Yes.

Q. Well, was it the charges that you made against him? A. Yes.

Q. Was that mentioned?

A. No. But he said "it," and I knew what he meant.

Q. Now, what else was said?

A. That was all about that.

Q. All right. Was there anything else said?

A. Well, before he said that, on our way down we ran into one of the kids I used to know, and he said, "Hi" to me, and I said, "Hi" to him, and Rollie said, "Well, we are going to get this thing straightened out."

Q. All right. Was there anything else said?

A. There could have been, but I don't remember.

Q. Now, then, after—as I understand it, you and he walked [58] from the home out on Woodland Avenue to the office downtown? A. Yes.

Q. And then, when you got there, you were asked certain questions, were you?

A. Yes, I was.

Q. Then after you had finished making your statement did you leave the office?

A. Yes, I did.

Q. And when did you come back?

(Testimony of Loretta Lindsey.)

A. To the office?

Q. Yes. A. That afternoon.

Q. Can you tell about what time?

A. No, I couldn't.

Q. Was it late afternoon; do you remember?

A. I don't remember.

Q. Do you remember what you did when you went back to the office?

A. I came back and signed that piece of paper.

Q. Did you read it over? A. Yes.

Q. And then you left? A. Yes.

Q. Now, that was on August 25th, according to the date. Now, [59] from August 25th you were staying at the McMasters', were you?

A. Yes, I was.

Q. And were you around Mr. and—around your home, that is, Mr. and Mrs. Lindsey's house after you signed this statement? A. Yes, I was.

Q. Just tell the jury how often you were around there.

Mr. Munson: I object to all this unnecessary detail, your Honor. I don't see where it is material to the issues in this case. It is just wearing the witness out on a lot of trivial detail.

The Court: Well, it may be preliminary to something. It certainly would not be material to show how frequently she was around the house unless it led up to something that was material.

Mr. Ziegler: Well, I can't ask all the questions at one time that I have in mind, your Honor. Maybe I can shorten it up this way.

(Testimony of Loretta Lindsey.)

Q. (By Mr. Ziegler): After you signed this statement, Loretta, on the 25th of August, did Mr. Lindsey do anything further?

A. What do you mean by that?

Q. In connection with this statement you made saying all this wasn't true. [60]

A. Well, not exactly to that statement or whatever you call it, but he told me not to say anything, "Don't sign any papers when you go back to see the D.A.'s if you want to come home."

Q. Anything else?

A. Yes. I asked him about my examination by the doctor and what to do about it, what to say, what happened.

Q. Anything else?

A. Yes. He said to say you stuck a banana or something up you.

Q. Anything else?

A. He always talked about this, but I don't remember what he said.

Q. I see. Well, now, over how long a period of time was this, Loretta? This was the 25th of August you made the statement. Was it a week, two weeks, three weeks, four weeks?

Mr. Munson: I object on the ground of immateriality, your Honor. I can't see the purpose of this.

The Court: I think I missed that last question. Will you read the question to which objection has been made?

Court Reporter: Q. "Well, now, over how long

(Testimony of Loretta Lindsey.)

a period of time was this, Loretta? This was the 25th of August you made the statement. Was it a week, two weeks, three weeks, four weeks?" [61]

The Court: Well, it isn't clear to me—over how long a period was what?

Mr. Ziegler: That she was around the house with Mr. and Mrs. Lindsey. I want to find out if there was anything transpired in connection with this statement after she was around the house, after she made it.

The Court: Well, why don't you just ask her if anything happened with reference to that statement afterward?

Mr. Munson: He already has, your Honor.

Mr. Ziegler: And you objected to it as immaterial.

Mr. Munson: I objected to the details.

The Court: I don't think there was any question of that kind asked. I don't recall it.

Mr. Ziegler: No; there wasn't any question. I asked her—instead of asking her what happened, I asked her what was said and what was done, which is the same thing, as I understand it.

The Court: Well, I thought you were trying to fix some time or frequency or something of that sort.

Q. (By Mr. Ziegler): This is your signature, isn't it, Loretta? A. Yes.

Q. And that is—is this the paper you refer to as a statement that was signed before Robert Ziegler on August 25th?

(Testimony of Loretta Lindsey.)

A. I don't know the date, but I know I signed it.

Q. You signed it before him? A. Yes.

Mr. Ziegler: Do you have a copy of this (handing a document to Mr. Munson)?

Mr. Munson: I don't know. Your Honor, I do have an objection to this affidavit. I object to the fact that the complaining witness' own testimony indicated that the conversation that took place there was at least tripartite, with Bob asking Loretta questions and Mr. Lindsey, who was there, suggesting some of the answers, and this affidavit here would indicate a simple colloquy between the questioner, who was Bob Ziegler, and Loretta, and I think that that affidavit for that reason is certainly not representative of what took place at that interview.

The Court: Well, I think the objection will have to be sustained. You may offer it with your own witnesses.

Mr. Ziegler: I wanted to cross examine her on it, if the Court please.

The Court: You may cross examine her. I am just ruling against its admissibility at the present time.

Mr. Ziegler: I can't very well cross examine her without reading it. That was the purpose of offering it in evidence, its admittance. Of course, I realize the Court has ruled, and I don't want to, after the Court has ruled, argue again as to its admissibility, but—— [63]

The Court: Well, you don't have to, in order to

(Testimony of Loretta Lindsey.)

question her; I don't think you have to read from it.

Mr. Ziegler: Well, I want to question her on cross examination as to the actual statements that she makes, that she made in this statement, your Honor. She has testified on direct examination.

The Court: Yes; but she has testified in the manner that the District Attorney indicated, which makes it inadmissible, and, so, that, if you want to question her about anything she said there, you will have to use as a basis for the questions something else than that document.

Mr. Ziegler: Does the Court, so I may understand the Court's ruling, does the Court rule that I can't read from this statement that I have here that she made?

The Court: No; otherwise it would be just circumventing the ruling of the Court holding it to be inadmissible under her testimony. She is the one who testified to the manner in which these answers were elicited and that makes it inadmissible, so you are remitted to your own witnesses in order to renew the offer to introduce it into evidence.

Mr. Ziegler: Well, your Honor, the situation is this. I can't cross examine her with respect to the contents of the statement in view of the Court's ruling, and I either am going to have to recall her or ask that the statement be properly identified at this present time out of order so I can [64] question her.

The Court: Well, of course, I don't see why you need that statement to cross examine her. The oc-

(Testimony of Loretta Lindsey.)

currence, such as it was there, is one that is susceptible of inquiry without looking at any paper.

Mr. Ziegler: Well, if the Court please, as I understand the procedure, if this statement is not admitted now, I can't cross-examine her about the contents; if she is away from the stand, I will not have the opportunity to ask her in connection with this and the truth of it.

The Court: If you want to stick to that statement on your cross examination instead of what occurred there, why, that is up to you, but I can't permit you to conduct a cross examination from something that I have ruled out of evidence.

Mr. Ziegler: I would ask permission of the Court to call the witness out of turn and have him state——

The Court: Well, when the time comes that you think it is proper to make such a motion, you may do so, but we needn't commit ourselves to anything of that kind now.

Mr. Ziegler: The only difficulty I find myself confronted with from the Court's ruling is that, after the witness is through, I can't cross examine her in connection with actual statements she made in the affidavit. She is off the stand.

The Court: Well, that is the same difficulty that [65] everybody is in who is up against an adverse ruling about the admissibility of documents. I don't know how the Court is going to avoid that. It seems to me that, what would ordinarily happen in a situation of this kind, you would call your own wit-

(Testimony of Loretta Lindsey.)

nesses on your own case, and then, if the District Attorney wasn't satisfied with what your witnesses testified, he would call this witness on rebuttal, and then the thing would be thoroughly explored, but at present——

Mr. Ziegler: As long as I would have the right to recall her after this is admitted in evidence——

The Court: I wouldn't say that you would have the right to recall her, but, as I say, that is something that need not be decided at this moment.

Mr. Ziegler: Well, your Honor, it puts me into a sort of a legal situation here where it is pretty difficult to——

The Court: Well, as I say, that is the same kind of dilemma any counsel is in when he is faced with an adverse ruling. There is nothing unusual about it in that respect.

Mr. Ziegler: She has identified the statement as her signature.

The Court: Yes; I guess she has.

Mr. Ziegler: My understanding, of course, is that anything that is signed, a statement a person signs, an adverse witness, would be admissible evidence.

The Court: Well, it would be admissible evidence if there wasn't already evidence in the case repudiating it in part. If it were not for that partial repudiation, why, that would be true.

Mr. Ziegler: Well, as I understand it then, your Honor, in a case of this kind all a witness needs to do is to say, "Well, the statement isn't true," and, therefore, it can't be introduced in evidence.

(Testimony of Loretta Lindsey.)

The Court: Well, certainly not, not on her testimony. You have to call your own witnesses. I have already stated that.

Mr. Ziegler: I don't like to be contentious with the Court, but I would like to have the opportunity, and I feel that that is right, to cross examine the witness.

The Court: I have already told you that I am not going to make that decision in advance. I will make it when the time comes, when you renew it.

Q. (By Mr. Ziegler): Now, Loretta, you have testified to the actions of Mr. Lindsey from the time you were, I think, around seven years old?

A. Yes.

Q. And, now, as I recall it, the first time you stated an act of intercourse took place was when you were nine or ten years old; is that correct?

A. Yes. [67]

Q. Where did that take place?

A. On the boat.

Q. On the boat? A. Yes.

Q. And do you remember the day or year or month or night; do you remember that? What you are trying to say is there was such an occurrence or happening sometime on the boat? A. Yes.

Q. And do you know how old you were then?

A. I said around nine.

Q. Around nine? A. Yes.

Q. All right. Now, after that, when was the next time? A. When was the next time what?

(Testimony of Loretta Lindsey.)

Q. That you claim Mr. Lindsey had intercourse with you?

A. I didn't, but I gave him a date when I know he did, the first time he had actual intercourse.

Q. When was that? A. October 22, 1951.

Q. How old would you be then?

A. Twelve.

Q. And the first time then was on the boat when you were about nine? A. Yes. [68]

Q. And the next time you remember was at the house when you were about twelve?

Mr. Munson: Your Honor, that isn't what the witness just testified to.

Mr. Ziegler: Well, if the Court please, I have a right to cross examine her.

Mr. Munson: Yes; but, I mean, you just summed up incorrectly.

Mr. Ziegler: Oh, if I did, I am sorry for that. I didn't intend to.

Q. (By Mr. Ziegler): Well, let's—if you don't understand my questions, Loretta, I don't want you to answer them.

A. I wasn't going to answer that. I was going to tell you what I said in the first place.

Q. Don't answer any questions that you don't understand, because I am certainly not going to try to mix you up in saying anything. All I am trying to get at is the facts as you tell them. Now, as I recall your testimony, the first time this occurred was, when you were about nine years old, on the boat?

(Testimony of Loretta Lindsey.)

Mr. O'Connor: Your Honor, the first time what occurred?

Mr. Ziegler: An act of intercourse.

Mr. O'Connor: A full act of intercourse; is that the question? [69]

Mr. Ziegler: Well, that is the way I remember the testimony.

The Court: But she has already answered that. There is no use of going over the same thing.

Mr. Ziegler: Well, I have got to fix dates for the purpose of my question, your Honor.

The Court: Well, but that particular act, the first act of intercourse, is not made a part of the indictment, so you don't have to fix a date for that.

Mr. Ziegler: Well, it is cross examination, and it goes to her credibility, her reason for the story.

The Court: Well, certainly, but you better make the question something else than something that you have already asked. My point is, you have already asked the question and she has answered it.

Q. (By Mr. Ziegler): Well, when, after the incident on the boat, was the next time you claim he had intercourse with you?

A. The next time I claimed that he had successful intercourse with me was October 22, 1951.

Q. October 22, 1951? A. Yes.

Q. All right. Now, how old were you? You stated you were about nine years old when this incident occurred on the boat? [70] A. Yes.

Q. How old were you in 1951 when you claimed was the first successful act? A. Twelve.

(Testimony of Loretta Lindsey.)

Q. Twelve? A. Yes.

Q. That is a period of three years?

A. Yes; but he done things in between time.

Q. How is that?

A. He did things in between time.

Q. You mean he had intercourse with you during that three-year period? A. He tried.

Q. He tried? A. Yes.

Q. But the first time he was successful was October 21, 1951? A. Yes.

Q. And on that same day did he also have a copulation in your mouth too, the same day?

A. Yes.

Q. The same time? A. Yes.

Q. And also committed the other act of, as you described, putting his tongue in your private parts?

A. Yes. [71]

Q. That was around October 21, 1951?

A. October 22nd.

Q. October 22, 1951. And that was the time, you say, Mrs. Lindsey was in the hospital having a baby? A. Yes.

Q. All right. Now, can you tell us when the next time occurred?

A. When he had intercourse with me the next time?

Q. Yes.

A. The only date I can remember is October 23, 1952, but he had in between time a lot of times.

Q. A lot of times? A. Yes.

Q. How many times?

(Testimony of Loretta Lindsey.)

A. I couldn't estimate it. I could estimate it, let's see, in a year, between twenty and thirty times.

Q. How is that?

A. Between twenty and thirty times.

Q. Between twenty and thirty times in that one year; is that correct? A. Yes.

Q. And where did these acts take place?

A. At the house or the boat.

Q. Were there more times on the boat?

A. Yes, there was. [72]

Q. How many times on the boat?

A. Well, only about three or four.

Q. And when did that occur?

A. I don't know, but it happened in between those times in the year.

Q. Between October 22, 1951, and October 22, 1952? A. October 23, 1952.

Q. October 23rd what? A. 1952.

Q. October 23, 1952. This happened twenty or thirty times? A. Yes; but it could be more.

Q. He had intercourse with you that many times? A. Yes.

Q. Sometimes on the boat? A. Yes.

Q. Four or five? A. Three or four.

Q. Three or four. And where did this take place at home? A. My bedroom, or his bedroom.

Q. And where is your bedroom in the house, downstairs or upstairs? A. Upstairs.

Q. Where is his bedroom? A. Downstairs.

Q. And what time of the day or night? Did it happen at [73] various times?

(Testimony of Loretta Lindsey.)

A. Yes; night, day, suppertime, morning.

Q. And, as I remember it, on one occasion you said that this occurred when Mrs. Lindsey was in the house asleep? A. A lot of times it did.

Q. A lot of times it did? A. Yes.

Q. And Mr. Lindsey then went through all these acts that you testified to upstairs when Mrs. Lindsey was sleeping downstairs?

A. Some times.

Q. You said a lot of times.

A. Sometimes he did, and sometimes he didn't.

Q. Did I understand you or recall correctly that you said a lot of times she was in the house?

A. A lot of times she was what?

Q. She was in the house when he would do this?

A. She was in the house, yes; but are you talking about nighttime now?

Q. Yes; I am asking you.

A. Would you restate that sentence?

Q. Yes. I asked you how many times this happened, and asked you if Mrs. Lindsey was in the house, when this happened, awake?

A. Sometimes, and sometimes she wasn't. [74]

Q. And you said a lot of times, didn't you?

A. Yes. A lot of times doesn't mean she was there all the time though.

Q. No. I understand. Your statement is that a lot of times he did it when she wasn't there; is that right? A. Sometimes he did.

Q. Sometimes he did it when Mrs. Lindsey wasn't there? A. When she wasn't there?

(Testimony of Loretta Lindsey.)

Q. When she was not in the house?

A. Yes.

Q. And a lot of times he did it when she was in the house? A. Yes.

Q. Did I understand you to say at one time—now, don't answer this, because my memory might not be correct—did I understand you to say he did it one time when she was washing the dishes?

A. Washing the dishes?

Q. Yes.

A. I don't think I said that. I said when I was washing clothes.

Q. I am not saying you did, Loretta. Was it washing clothes or washing dishes?

A. Washing clothes.

Q. Washing clothes.

Mr. Munson: Excuse me. I think that counsel and [75] the witness are speaking of two different things. You are talking about Mrs. Lindsey, aren't you, counsel?

Mr. Ziegler: Yes.

Mr. Munson: Is that what you were referring to? A. No. I was washing clothes.

Mr. Munson: Her testimony was that he had intercourse with her one day when she was washing clothes.

Q. (By Mr. Ziegler): Did you say that this happened one time when she was cooking dinner?

A. Yes, I did. It happened—I wouldn't say one time—it happened quite a few times when she was cooking dinner.

(Testimony of Loretta Lindsey.)

Q. Two or three times while she was cooking dinner in the house Mr. Lindsey went to your room upstairs or he went to his room——

A. It was never in his room when she was home.

Q. Never in his room, but always in your room?

A. Yes.

Q. Upstairs? A. Yes.

Q. And he committed these acts when she was downstairs cooking dinner? A. Yes.

Q. Are you sure of that?

A. Some of the acts sometimes. He wouldn't do them all, that I stated in my——what I said before. He would do [76] some of them, but not all of them. Sometimes he would do all of them.

Q. Well, did he do these same things every time, Loretta? Now, did you testify on direct examination that each time he committed this act he did the same thing? I don't want to go through it. Did you so testify? A. Would you say that again?

Mr. Munson: Your Honor, I don't know whether the witness——

The Court: I think you have to differentiate, when you ask a question of that kind, between the times that she said that he did it according to the indictment and the other times in between, or otherwise you fail to understand each other.

Mr. Munson: I am just sitting here kind of confused by the periods of time here, and I don't know whether the witness——

The Court: Well, I think that is what is confusing.

(Testimony of Loretta Lindsey.)

Mr. Ziegler: Well, I was referring to the period of time after October 21st, or 22nd, 1951, when she first said that there was a successful act of intercourse.

The Court: Well, you might have been referring to it, but she didn't know it. You didn't say it.

Mr. Ziegler: Well, I think I did, your Honor; I think I asked her.

The Court: Well, go ahead and question her, but [77] you will have to differentiate between acts that are made the subjects of the counts in the indictment and the acts that are made evidentiary and not the subjects of counts.

Mr. Ziegler: Yes.

Q. (By Mr. Ziegler): Loretta, after October 21, 1951, now, that is the time, as I understand it, that you claim was the first time he had successful intercourse with you? A. Yes.

Q. Now, after that time and up until the next date that you fixed, which was October 22, 1952, you testified on your direct testimony that he did this to you a number of times? A. Yes.

Q. Twenty or thirty, was it?

A. Between twenty and thirty.

Mr. Munson: That was elicited on cross examination.

Mr. Ziegler: Well, I know, but on direct she testified, as I recall it, Mr. Munson, that he committed these acts a number of times.

Q. (By Mr. Ziegler): Well, now, Loretta, you understand my question now. You say it was be-

(Testimony of Loretta Lindsey.)

tween twenty and thirty times. Now, the question is this. Did he do the same, go through the same performance each time, do it the same way?

A. No. [78]

Q. Well, in what respect was it different?

The Court: Well, I think you ought, to make it plain, you ought to ask—did he do all three acts at the time or merely sexual intercourse?

Mr. Ziegler: Yes.

Q. (By Mr. Ziegler): Did he——

A. I said no. I said he didn't do all three things sometimes, and sometimes he did. Sometimes he would do altogether different things.

Q. Sometimes he would do all three things, and other times he would only engage in sexual intercourse?

Mr. Munson: Your Honor, I object. This has been answered at least four times by this witness. I don't know what defense counsel is doing, but it seems to me that the cross examination is just being harassingly delayed.

The Court: Well, it is repetitious, but I suppose it will be going on to something else.

Mr. Ziegler: Well, if the Court please, we certainly object to any statement of counsel intimating that the attorneys for the defendant are trying to harass this girl. We are in a position here where the defendant is accused of a serious crime, and, certainly, we are entitled to a lot of latitude in cross examining the prosecutrix.

Mr. Munson: In reply to that, your Honor, I

(Testimony of Loretta Lindsey.)

would like to point out that this girl has just turned fifteen; she [79] has been on the witness stand now for two and a half hours; and she is being asked the same questions over and over again, to which she has testified fully on her direct.

The Court: Well, there is nothing before the Court now, so there is no use of arguing anything to the Court. Proceed to your next question. There is nothing before the Court that the Court can act on. The last question has been answered.

Q. (By Mr. Ziegler): Now, Loretta, did he do these things more than once some days? Did he do them two times? A. Sometimes, yes.

Q. Sometimes two times in one night or one day? A. One day.

Q. Was there ever a day in which it occurred more than two times?

A. Not that I can remember.

Q. Now, Loretta, you mentioned something about restrictions. Who put any restrictions on you?

A. Both my mother and father.

Q. And what for? What were they?

A. Oh, various things.

Q. How is that?

A. I said various things.

Q. Could you name them, tell us about it?

The Court: Well, were they restrictions on going [80] out, if any?

A. Yes; going out.

The Court: What else, if anything, or is that the only one?

(Testimony of Loretta Lindsey.)

A. That is the only one they put on me, just going out. That is what it was always for, not going out to a show or not even going out to play with the neighborhood kids.

Q. (By Mr. Ziegler): Well, did they give you any reason for taking away of privileges from you?

Mr. Munson: I object, that the reasons aren't material, your Honor. I don't even see where it is proper cross examination.

The Court: Well, it is proper cross examination, but the reasons for the restrictions imposed by the parents are absolutely immaterial here. The parents may have their own reasons, even though they may be cockeyed.

Mr. Ziegler: Well, the only thing, your Honor, is that she stated on her direct examination that restrictions were placed on her, and perhaps the jury might get the impression that they were unduly placed or that she was mistreated.

The Court: Well, the jury isn't trying the parents here for unduly restricting any of their children. The only way that the restriction can possibly become relevant here is in view of the one bit of testimony that she gave that upon having intercourse with him once, why, he threw the restrictions [81] overboard for that evening and let her go out.

Q. (By Mr. Ziegler): Now, Loretta, you testified that Mr. Lindsey hit you?

A. Yes, he did.

Q. Once or more?

A. A lot of times.

(Testimony of Loretta Lindsey.)

Q. A lot of times. What for?

Mr. Munson: I object again, your Honor. I don't recall any—I see no materiality to this question.

The Court: It is immaterial unless it is connected up with the acts charged or in evidence.

Mr. Ziegler: That was my impression, your Honor, from her testimony.

The Court: But you didn't put it in your question.

Q. (By Mr. Ziegler): Did he hit you at any time, Loretta, in connection with these acts that you have claimed occurred? A. Yes.

Q. Now, just tell us about it.

A. What do you mean? How he hit me, or what?

Q. Well, maybe I can ask you the question. Do I understand you that after he committed some of these acts that he hit you then? A. After?

Q. Yes. [82] A. No.

Q. Or was it that he hit you because you wouldn't submit to these acts?

A. Sometimes he did.

Q. In other words, he would beat you if you wouldn't? A. I didn't say that.

Q. In other words, he hit you then?

A. Yes, he hit me.

Q. Because you wouldn't agree to do these things? A. He just hit me.

Q. How is that? A. He just hit me.

Q. And as a result of that then did you submit to what he wanted you to do; did you agree to it?

A. What do you mean?

(Testimony of Loretta Lindsey.)

The Court: Well, did you give into him after he hit you? A. Well, sure.

Q. (By Mr. Ziegler): And that happened a number of times? A. No.

Q. How many times?

A. Well, I don't know. Oh, I would say about five or six times.

Q. Five or six times he hit you and made you submit to these acts? [83]

A. He hit me, and I wouldn't want to be hit any more, so——

Q. How is that?

A. He hit me and I—and then I would rather have him do that to me than to be hit.

Q. Well, would he keep hitting you then like that until you did submit?

A. Not like that.

Q. Well, you tell me how he did it. You are the witness.

A. He would go like that, take his hand, like that, and hit me like that.

Q. Hit you in the face? A. Yes.

Q. Now, what I am trying to find out, Loretta, did he keep on hitting you until you said you would do it? A. No.

Q. He just hit you once?

A. Once or twice or three times.

Q. Now, Loretta, when you first went to the Riewolds and these other people, just tell me and the jury what you told them Mr. Lindsey had been doing.

(Testimony of Loretta Lindsey.)

Mr. Munson: Is the defense adopting this witness now?

Mr. Ziegler: It is cross examination.

Mr. Munson: We didn't go into that on direct, your Honor. [84]

The Court: Well, I thought that there was some testimony as to her making a complaint to the Riewolds. If so, it is proper cross examination.

Mr. Ziegler: I want to see if she made the same statement then as she is making now, your Honor. That is the purpose of the question.

The Court: You may ask it.

Mr. Munson: Before counsel goes on——

Mr. Ziegler: I am waiting for you to give you time.

Mr. Munson: I would like to notify the Court now that, since the defense has opened up this area, I intend to call witnesses to testify as to what actually went on between these people that the complaining witness talked to.

The Court: Well, I don't quite understand what you mean by "what actually went on".

Mr. Munson: Your Honor, I don't believe, unless I am badly mistaken, I don't believe that I——

Mr. Gilmore: He is testifying now. Excuse me.

Mr. Munson: I am not testifying.

Mr. Gilmore: I thought you were going to say what you believed.

Mr. Munson: No. I don't believe that I asked the witness anything about what she said to——

The Court: Well, you didn't ask her about what

(Testimony of Loretta Lindsey.)

she said perhaps, but she did say that she went down and told the Riewolds, as I recall. [85]

Mr. Gilmore: At least twice, as I recall.

The Court: And, if she said that, why, then he would have a right to cross examine her and ask her what it was she told them.

Mr. Munson: Yes, your Honor.

Q. (By Mr. Ziegler): All right, Loretta, just tell us and the jury what you told Riewolds that your father had done to you.

A. I went over and told Don and Ann Riewold, what I told them—when I first went over there I didn't tell them anything about what my father had done to me. I told them they would have to just get a new baby sitter and housekeeper as I was going to run away and go down to see my Mom, and then Don asked me himself if that was all I said, if that was all, if it was the only reason why I was doing it, and I told him no, but then later I told him, yes, there had been something else, and I told him what my father had done to me, and he said he suspected that the way I was acting.

Q. Now, what did you tell him your father had done to you, Loretta?

A. Just what I said before, what he had done.

Q. Well, isn't it a fact, Loretta, that you told Mr. Riewold that your father had raped you?

A. I don't know if I used that word or not. I could have, [86] but I don't remember.

Q. Now, let me ask you this question. Did you tell him, tell Mr. Riewold, that your father had

(Testimony of Loretta Lindsey.)

done these other things to you that you are now telling in court?

A. What do you mean by "other things"?

Q. Putting his penis in your mouth and the other things.

A. I told him that he had stuck his penis in my mouth, and he told me not to tell Ann that or she would get sick.

Q. You told Mr. Riewold that? A. Yes.

Q. Did you tell him about the other act of putting his tongue—— A. I don't remember.

Q. You don't remember that? A. No.

Q. Now, do you remember, Loretta, when you had the hearing and trial in the Commissioner's Court here the last of May and you appeared as a witness there and told about this? A. Yes.

Q. Did you tell anything there about putting his penis in your mouth and this other business?

The Court: Well, a question of that kind is improper unless you first ask whether she was asked the question whether she did that, otherwise it is meaningless. [87]

Q. (By Mr. Ziegler): Now, Loretta, you just stated that you told the Riewolds, I think, you wanted to go away and go down and see your Mom?

A. Yes.

Q. And how long before you told the Riewolds about this had you been thinking and planning?

A. I hadn't planned it at all.

Q. You hadn't planned it at all? A. No.

Q. And, now, did you say, when you made this

(Testimony of Loretta Lindsey.)

statement last August, that you wanted to get away from Ketchikan, or words to that effect, wanted to go to see your Mom, and that was the reason you had told these things about Mr. Lindsey? Did you say that? A. No.

Q. Didn't you say that in the statement you signed up in the lawyer's office?

A. Then I did, yes, but it was all a lie.

Q. Well, now, Loretta, let me understand you. Do you just tell lies at your convenience to suit you, or do you do it because you are forced to tell lies?

Mr. Munson: I object, your Honor. That is an argumentative question, your Honor.

Mr. Ziegler: No, it isn't. It is a fair question, your Honor. [88]

The Court: Well, I think the question is permissible. At least she can be asked why she would say—why she would tell the lies that she says she told.

Mr. Munson: Well, then I object on the ground that he has asked her two questions and it would be impossible for her to answer both of them with one word.

Q. (By Mr. Ziegler): Well, Loretta, that was a lie then that you told up there in the statement if you said that the reason you made these charges was that you wanted to go to Seattle; that was a lie, wasn't it?

A. What? I don't understand you.

Q. Now, I don't want you to answer a question

(Testimony of Loretta Lindsey.)

unless you understand it. Did you, when you made the statment up in the office——

A. What office?

Mr. Munson: Your Honor——

Q. ——before Bob Ziegler——

Mr. Munson: ——excuse me, counsel. We are back to this affidavit that has been ruled out of evidence now. I wonder, your Honor, if the rule of the Court excludes this particular question?

Mr. Ziegler: Well, I think I can divorce it entirely from this statement.

The Court: Well, if you can do that, why, you can, of course, cross examine her as to the occurrence. [89]

Q. (By Mr. Ziegler): Loretta, did you at any time tell anybody that the reason you made the charges against Mr. Lindsey was that you wanted to leave home, to get away from home, and go to your Mom in Seattle?

A. Yes; but that wasn't why I did it though.

Q. Now, that was a lie, wasn't it?

A. Yes.

Q. Are you—do you often tell lies then, Loretta? A. No.

Q. Well, you know it is wrong, don't you, to be telling lies?

A. I know, but I did that just so I could go back to my Mom and Dad and my little brother and sisters.

Q. And the man who had committed all these atrocities on you, that you testified to, you were

(Testimony of Loretta Lindsey.)

willing to tell a lie in order to come back under his roof; is that true?

A. I really wanted to come back because of my Mom and my little brother and sisters.

Q. Now, what was your reason?

A. Because I wanted to come back to my Mom and the kids.

Q. You wanted to come back to your Mom and the kids? A. Yes.

Q. And you knew Mr. Lindsey was there, didn't you?

A. Yes; but I thought I could trust him after I told all that, which he knew was true and he still does.

Q. But in order to do that you told a lie? [90]

A. Yes.

Q. And on top of that, as I understand your testimony, in order to get away from Wrangell, to get away from the Welfare, where you were placed, you even accused the Marshal, Mr. Krepps, up there of raping you? A. I didn't say rape.

Q. Well, of being the father of your child?

A. I don't have any child.

Q. Well, didn't you say, when you testified before, that you told Mrs. Krepps that you were pregnant?

A. I didn't tell her that. I made her think that though.

Q. You made her think that? A. I did.

Q. And, when she asked you, you blamed Mr. Krepps for it, didn't you?

(Testimony of Loretta Lindsey.)

A. I told her that Jack was the one.

Q. You told her that Jack was the one. And you go to the extent of accusing an innocent man, Mr. Krepps, of this very crime now you are charging your father with?

A. I did that and made up that affidavit because I love my Mom and the kids and I still do.

Q. And you want the jury then to believe that one time you are telling the truth and the next time you are telling a lie?

The Court: Well, that is an improper question. The [91] jury is not bound by anything the witness wants done. The jury has got to use its own judgment about what they will believe.

Q. (By Mr. Ziegler): Now, Loretta, how long had you been thinking about this deal at Wrangell in order to get away from there and come back home—many days? A. No.

Q. Or did it come on all at once?

Mr. Munson: I object to the question as immaterial, your Honor.

The Court: Objection sustained.

Q. (By Mr. Ziegler): Well, Loretta, before you did come back, I understood you to say you wrote some letters to your mother and father?

A. I wrote one letter.

Q. One letter? A. Yes.

Q. And who were the other letters to, if you wrote one letter to them?

A. I wrote some separate letters inside, but one was for my Dad, and one was for my Mom, and I

(Testimony of Loretta Lindsey.)

wrote one to Randy and Janice even though they couldn't read it.

Q. Now, when you came to their house, after getting back from Wrangell, on August 25th, I think you testified to, they hadn't even received those letters, had they? [92]

A. At least they told me that.

Q. How is that? A. They told me that.

Q. They told you that they hadn't gotten any letters? A. Yes.

Q. Do you recall what you said in those letters?

A. Like I said before, I told them that I was dropping the charges against them and that I was sorry that I did it and they weren't true. The reason I said they weren't true was because I knew my mother would probably read all those.

Q. Who? A. My mother.

Q. Well, when you wrote those letters, had you succeeded then in getting Mr. Krepps' consent for you to come back to Ketchikan?

A. Yes. They even read those letters.

Q. They read them before you even sent them?

A. Yes.

Q. And did Mr. Krepps at that time call the District Attorney and tell him about it?

A. I don't know what he did.

Q. Is that the letter I have asked you about Loretta? A. Yes, it is.

Mr. Munson: Could I see those letters? [93]

(Mr. Ziegler handed documents to Mr. Munson.)

(Testimony of Loretta Lindsey.)

Mr. Munson: No objection.

Q. (By Mr. Ziegler): These—there are four letters here, Loretta, I think. I will ask you if they are all signed by you? A. Yes.

Q. They are all? A. Yes.

Mr. Ziegler: We will offer them in evidence, if the Court please. There is no objection.

The Court: If there is no objection—

Mr. Munson: No objection, your Honor.

The Court: —they may be admitted.

Mr. Ziegler: And this is the envelope they came in.

Clerk of Court: You are introducing them as one exhibit? They will be Defendant's Exhibit A.

Mr. Ziegler: Now, these letters, if the Court please—I will read this letter, so I can ask whatever questions I want, dated August 22, 1954, 10:15 p.m. "Dear Mom"—

The Court: Well, now, if you want to ask questions, why don't you just ask her what questions you want instead of reading them? She has already read them and she knows what they contain apparently.

Q. (By Mr. Ziegler): Did you say in this letter, Loretta, addressed to "Dear Mom"— [94]

The Court: She has already admitted everything in the letter, so just ask her what else you want to ask without that repetition.

Mr. Ziegler: I was going to read the letters in evidence at this time.

The Court: Well, I thought you were going to ask her questions.

Mr. Ziegler: Not necessarily.

(Testimony of Loretta Lindsey.)

The Court: Well, the letters will apparently go into the jury as exhibits, will they not?

Mr. Ziegler: Yes, your Honor.

The Court: Well, unless you are going to ask her questions from the letters, there is no necessity of reading them now.

Mr. Ziegler: Well,—

The Court: You can read them on argument, and they will go to the jury to be read.

Q. (By Mr. Ziegler): Well, Loretta, in these letters that you wrote you asked forgiveness from your father and mother for what you did, didn't you? A. Yes.

Q. And told them that you had made a mess of things? A. That is what I said.

Q. You told them that—

The Court: You are doing just what I said. She [95] has admitted everything in the letters, so you will have to ask her something else. There is no use of repeating to her what she has already admitted and asking her if she said that or wrote it. She has already admitted it. The reason I say that is we have been making a snail's pace here most of the afternoon, just like molasses.

Q. (By Mr. Ziegler): Now, Loretta, you have testified on—when Mr. Munson was questioning you—that you had trouble at home?

A. That I what?

Q. That you had trouble at home before you made these charges, trouble with your parents?

A. I don't remember it.

(Testimony of Loretta Lindsey.)

Q. Well, then, if you didn't, let me ask the question then. Did you have trouble at home?

A. When do you mean?

Q. Before—at any time from the time they adopted you up until the time you made these charges.

Mr. Munson: I object, your Honor. That is certainly a broad question.

The Court: That is all she has been testifying to, is trouble, here. Now, if you want to ask a question of that kind, let me suggest that you ask if she had trouble other than the trouble she has already testified to.

Mr. Ziegler: Yes. Well, I certainly wasn't referring [96] to the trouble she testified to.

The Court: Well, she has been testifying to her troubles all afternoon.

Q. (By Mr. Ziegler): Did you have trouble at home, Loretta, not what you testified to, what your father did, but any other trouble with your parents that caused you to run away?

A. I ran away before I was adopted; at least before I thought I was adopted.

Q. And did you run away afterwards?

A. Yes.

The Court: Well, now, this is too remote. As I understand it, that must have been about five years before this case was initiated.

Mr. Ziegler: Well, your Honor, the witness has testified to improper conduct and acts of the defendant commencing with about the first year she

(Testimony of Loretta Lindsey.)

was adopted, when she was around seven years old, and that is the period I am trying to cover.

Mr. Munson: Well, your Honor, I presume that the cross examiner here is trying to evoke testimony showing hostility toward the defendant. I can't imagine any other ground for it.

The Court: Well, it seems to me the only point on which it would be material would be on motive.

Mr. Ziegler: That is the purpose.

Mr. Munson: Well, her motive when she was seven years old——

The Court: Seven or eight years ago is certainly too remote. You would have to bring it more down to date than that.

Q. (By Mr. Ziegler): Loretta, when did you run away from home the last time before you made these charges? You made these charges in April or May of this year. Now, when was the time just before that that you ran away?

A. I don't remember the date, the year, the month, or anything like that.

Q. Was it the year before that date?

A. I don't know.

Q. Well, what is your best memory?

A. I know though that Randy was born and Janice was born. I know I ran away just right after Christmas.

Q. Now, Loretta, did you get mad at your mother and father for telling you that they weren't going to put up with these troubles any more and were going to send you to the Haines School?

(Testimony of Loretta Lindsey.)

A. What troubles?

Q. Well, I am asking you. Did you get mad when they told you that and that they were going to send you to the Haines School? [98]

The Court: Well, first you better ask her if they told her that.

Mr. Ziegler: Yes.

Q. (By Mr. Ziegler): Now, Loretta, were you advised by your parents that you would have to go to the Haines School this last school term, starting in September? Did they tell you at any time this year that they were going to have to send you to the Haines School?

Mr. Munson: I object. I think the question is immaterial, your Honor. I don't see how it possibly bears on this case.

The Court: Well, it isn't apparent to me either, but maybe he is directing the question to a possible motive of some kind.

Mr. Munson: It is certainly immaterial in so far as Mrs. Lindsey is concerned.

Mr. Ziegler: It is preliminary to what I think is material, your Honor.

The Court: Go ahead with the next question.

Mr. Ziegler: And the Court can rule on that when the time comes, which he will if there is an objection.

Q. (By Mr. Ziegler): Did they tell you, Loretta, that they were going to send you to the Haines School? A. They told me that.

Q. And you didn't like that, did you? [99]

(Testimony of Loretta Lindsey.)

A. I didn't.

Q. You didn't want to go to Haines?

A. No. In fact I was glad.

Q. You were glad. You never told them that you didn't want to go to Haines?

A. I told them I didn't want to go at the time; yes.

Q. Now, when you filed these charges, as I understand it, you wanted to get away from the Lindseys, didn't you? You wanted to get away from Ketchikan?

A. No.

Q. You didn't want to get away from them?

A. All I wanted to do was see that Mr. Lindsey, whatever he had done to me, pay for it. I didn't want to leave Ketchikan, and I didn't want to leave home.

Q. Well, when you told Mr. Riewold, didn't you call your stepmother in Seattle?

A. Yes, I did.

Q. And told her you were coming down there?

A. I told her, because of what had happened here, I couldn't stay here.

Q. And you hadn't written any letters or made any plans about leaving Ketchikan before you made this charge?

A. No.

Q. Is that your writing, Loretta?

A. No. [100]

Q. It is not your writing? A. No.

Mr. Munson: Could I look at that?

(Mr. Ziegler handed document to Mr. Munson.)

(Testimony of Loretta Lindsey.)

Q. (By Mr. Ziegler): You are sure that is not your writing, Loretta? A. Yes.

Q. If this were found in your books after you left the Lindsey home, would you still say it wasn't your writing? A. Yes.

Q. Do you know whose writing it is?

A. No, I don't.

Q. Now, Loretta, did you get any ideas about making these kind of charges from reading any mystery magazines or——

A. I don't read very well, and so I don't like to read. No; I didn't.

Q. You don't read mystery magazines?

A. I do, but I don't understand them.

Q. You don't understand them? A. No.

Q. What grade are you in in school?

A. I am in the eighth grade.

Q. Why do you read these mystery magazines if you don't understand them?

A. I don't read them. [101]

Q. Oh, you don't read them?

A. No. I read——

Q. I beg your pardon. I thought you said you do read them but you don't understand them.

Mr. Munson: Your Honor, I object to this question about mystery magazines on the ground that the subject matter of mystery magazines has nothing to do with this case and that the question is another collateral issue that we are going to spend a lot of time on and get nowhere.

The Court: Well, it wouldn't be collateral if he

(Testimony of Loretta Lindsey.)

could call her attention to a specific book that he had some reason to think that she read, but, just asking generally whether she reads books, why, the objection will be sustained.

Mr. Ziegler: I had reason to think she read them because she said so, your Honor, in her statement.

A. I told you that was a lie.

Q. (By Mr. Ziegler): And that is another lie then?

Mr. Munson: Your Honor, we continually come back to this statement which has been excluded about five times from the evidence.

The Court: All reference to the statement must be avoided in any questions to the witness at the present time.

Q. (By Mr. Ziegler): Now, getting back to the time that you claim that Mr. Lindsey did these things in the house, you stated that your mother was there some of the times? [102]

A. Yes.

Q. Was anybody else, outside of the little children?

A. My brother Bob could have been there a few times.

Q. How is that?

A. My brother Bob could have been there a few times, but I don't remember.

Q. He could have been there a few times. And where was his room?

A. Right down the hall from mine.

Q. On the upstairs? A. Yes.

(Testimony of Loretta Lindsey.)

Q. Do I understand then that Mr. Lindsey went into your room with your brother right close by and committed these acts?

A. He wasn't. I don't remember seeing him. He wasn't upstairs.

Q. Well, I thought I understood you to say that he could have been there?

A. I said he could have been, but I didn't say upstairs.

Q. Well, now, what is the fact, right now?

A. He could have been in the house, downstairs.

Q. He could have been in the house, downstairs. And in addition, to your mother being there in the house when some of these things were done, then your brother Bob could have been there?

A. My mother was there sometimes. My brother Bob could have [103] been.

Q. Could have been. You don't know?

A. I don't remember.

Q. And you couldn't swear that he ever was in the house when Mr. Lindsey did that?

A. When she was up or asleep?

Q. How is that?

A. When she was up or asleep?

Q. No. I am talking about Bob.

A. I thought you were talking about my mother.

Mr. Munson: Your Honor, I think I can help counsel out in his cross examination of this witness, if he would specify the time of the day that he is referring to, to give this witness some idea of what period of time is sought to be encompassed by the

(Testimony of Loretta Lindsey.)

question. I didn't know what was going on in the last interchange myself.

Mr. Ziegler: Well, I think it is very important, if the Court please, to know about——

The Court: There is nothing before the Court to rule on.

Mr. Ziegler: The objection was made, and I will ask the question.

The Court: But the question has been asked and answered, so there is nothing before the Court.

Mr. O'Connor: Your Honor, may we object to any [104] further questions that fail to specify the time of day or an occurrence that might have occurred?

The Court: I don't know why we need to get down to the details or the time of day or anything.

Mr. Munson: Well, I can tell you why, your Honor. The witness testified that at certain times of the day Bob was there and Mrs. Lindsey, and at other times when Mrs. Lindsey was not home, and at other times when she was home, and the cross examination is so broad that it was impossible for her to answer the questions that were directed to her.

The Court: Well, you mean, the questions of counsel always assume that Bob was there; is that it?

Mr. Munson: Always assume that somebody was there.

Mr. Ziegler: I didn't intend to create that impression, your Honor. I am asking——

(Testimony of Loretta Lindsey.)

The Court: Well, let's go on. We are going too slowly here. The first thing we know we will have the jury sitting out on Thanksgiving Day.

Mr. Ziegler: I appreciate the time that it is taking, your Honor. However, as I stated before, this is not a petit larceny case.

The Court: Well, you are just taking up more time now in making those statements.

Q. (By Mr. Ziegler): Now, I want to understand you thoroughly, Loretta, about Bob, your brother. Now, you have [105] testified only to three definite dates that he did these things. In between you have fixed no dates. Was Bob in the house on the 21st of October, 1951, when you claim Mr. Lindsey did these things?

A. I don't know. I wasn't there either.

Mr. Munson: You gave the wrong date. October 22nd.

Q. (By Mr. Ziegler): October 22nd; was Bob in the house then?

A. Yes; for about—till he got his lunch eaten.

Q. Well, was he in the house when Mr. Lindsey was doing these things to you?

A. No, he wasn't.

Q. He wasn't. All right. Now, the next time was October 22, 1952, wasn't it? A. October 23rd.

Q. October 23, 1952; was Bob Lindsey in the house then? A. No.

Q. The next time was in February this year, a definite date; was Bob Lindsey in the house then?

A. No.

(Testimony of Loretta Lindsey.)

Q. All right. Now, in between those times, from October, 1951, to the present time, can you tell us whether Bob was in the house when any of these things were going on?

Mr. Munson: I object on the ground that this is immaterial, your Honor. I don't see any possible materiality to whether Bob was in the house on other occasions or not. [106]

Mr. Ziegler: It is only on other occasions when he was committing these acts, and I think it is very material, your Honor.

The Court: It is proper cross examination. You may answer that, if you know.

A. What do you mean—morning, noon or night?

Q. (By Mr. Ziegler): You tell me whether he was there in the morning, at noon, or at night, at any time when you claim Mr. Lindsey did these things to you.

A. He was there in the early morning when Mr. Lindsey did those things to me.

Q. What time of the morning was it?

A. Well, early morning.

Q. Early morning.

The Court: You mean, while everybody was still abed? A. Yes.

Q. (By Mr. Ziegler): And when was that? You can't fix a date for that at all?

A. No, I can't. He did that so many times.

Q. How is that?

A. I said he did that so many times. I don't know what day it was.

(Testimony of Loretta Lindsey.)

Q. But that is the only time you know when Bob was there; is that right?

A. He could have been there when my mother was up too; that [107] was during suppertime or something like that.

Q. You mean that he committed these acts while the supper was going on?

A. While she was fixing supper.

Q. While she was fixing supper, he was upstairs doing these things?

A. He was downstairs or outside, but he was around the house.

Q. You mean Mr. Lindsey, or Bob?

A. My brother.

Q. But was that when Mr. Lindsey was doing these things to you?

A. When Bob was around?

Q. Yes.

A. Yes, he was, and my Mom and——

Q. While your mother was getting supper?

A. Yes.

Q. Now, Loretta, when you first testified in the case here in the Commissioner's Court at the preliminary hearing, did you know what the word "perjury" meant? A. No, I didn't.

Q. But did you find out later on what it meant?

A. Yes.

Q. And when?

A. When I was up in Wrangell.

Q. Mr. Krepps told you, did he? [108]

A. Yes. He explained that——

(Testimony of Loretta Lindsey.)

Q. And what did he tell you perjury meant?

The Court: Well, now, why do we have to go into this? It is just part of her education, I suppose.

Mr. Ziegler: Well, when it comes time, your Honor, to introduce this statement, I think it will have a bit of a bearing on whether she knew she was doing wrong and committing a crime.

The Court: Well, you can ask her when she first found out the meaning of perjury without going into all the details of her finding out.

Mr. Ziegler: Very well, your Honor. I don't think—I don't recall any details. What was the question that I asked? What was the question I asked her about perjury?

The Court: Well, you asked her about four or five, and you could have asked it in one question. When did you first find out the meaning of perjury? Just answer that.

A. When I was at Wrangell.

The Court: Well, I think she already said that.

Q. (By Mr. Ziegler): That was before you made this statement in front of Bob Ziegler, wasn't it?

A. Yes.

Q. So, when you made the statement and swore to it before a notary public, you knew what perjury meant?

A. Yes. [109]

Q. And you knew what could happen to you?

A. Yes.

Q. And you were willing to do that just in order to be able to come back home?

(Testimony of Loretta Lindsey.)

The Court: Well, she has answered that a half a dozen times.

Mr. Ziegler: Did you say there was an objection, your Honor?

The Court: I said she has answered that a half a dozen times.

Mr. Ziegler: Oh, I beg your pardon.

Q. (By Mr. Ziegler): Now, Loretta, after this statement was made and you were around Mr. Lindsey's house, after August 25th, this year, as I understand it, you were there quite often; that was your home, was it; but you were staying at the McMasters'; is that right?

A. I visited them a lot; yes.

Q. And you say that you kept going there for how long?

A. What do you mean—how long? How many hours or how many days?

Q. No. When did you stop going to the Lindsey house? A. Since I was subpoenaed.

Q. After you were subpoenaed, then you didn't go there any more? A. No. [110]

Q. Who told you you couldn't go there?

A. Nobody did.

Q. All right. Nobody did. Now, did you testify that up to the time you left there on account of the subpoena being served that Mr. Lindsey attempted or tried to do this thing to you again? Did he?

A. You mean after I got the subpoena?

(Testimony of Loretta Lindsey.)

Q. No. Before you got the subpoena; when you were friendly and going up there?

A. Yes, he did.

Q. He tried to do this again? A. Yes.

Q. After you had made all these charges against him? A. Yes.

Q. In the spring, you had come back to Ketchikan and asked his forgiveness and you were around the house there many times, and he attempted to do this very thing again? A. Yes.

Q. Tell me about it. Where did it happen? What was the date?

A. Like I said before, it was at the Lindseys' house, and Mrs. Lindsey wasn't home, and Janice and my Dad were, and I was playing with Janice, and she went to sleep, so I put her to bed and I came back out there and just sat down, and we were talking about this, and he asked me if I [111] missed it, and I told him, no, I didn't, and then he said, "Well, do you want it?" And I said, "No." And then I knew that I better leave before something happens, and then just then my grandmother came in.

Q. You knew then that he was out on heavy bail on this charge, didn't you? A. Yes.

Q. And notwithstanding that you now want the jury to believe that he attempted this again?

Mr. O'Connor: I object to that question, your Honor, on the ground of what she wants the jury to believe is irrelevant.

The Court: Objection sustained. It is immaterial

(Testimony of Loretta Lindsey.)

what she wants anybody to believe.

Q. (By Mr. Ziegler): Now, Loretta, when you got back from Wrangell and went into the Lindseys' home, you testified something about cotton balls that were used when he was committing these acts. You remember that, don't you?

A. Cotton wads; yes.

Q. Cotton wads. And did I understand you to say that when you came back from Wrangell you went upstairs?

A. Yes.

Q. To try to find these?

A. I didn't say to try to find them.

Q. Oh. Then I misunderstood you. I don't want to say [112] something you didn't say. Did you go upstairs to look for them?

A. I went upstairs. I don't know what I was looking for, but I went up to see what condition my room was in.

Q. I see. Well, did you make an examination around there?

A. I took a look. I looked in where I had those things, and it was cleared out.

Q. They were cleared out?

A. Yes.

Q. Well, where were they?

A. They were in my closet, not exactly my closet, but they were in the closet.

The Court: You mean, they had been in your closet; isn't that what you mean?

A. Yes.

The Court: You didn't see them there when you went upstairs?

A. No.

(Testimony of Loretta Lindsey.)

Q. (By Mr. Ziegler): But you weren't looking for them then?

A. No; but I knew they weren't there.

Q. How did you happen to think about those cotton balls. What brought it to your attention to notice that they weren't there?

The Court: Well, how could that be material?

Mr. Ziegler: To me it would be, your Honor, but I [113] realize the Court is the one to say whether it is material, and I submit to the Court's ruling.

The Court: Well, it is evident from her testimony now, both on direct and cross, that she happened to go up to her room to look around and noticed that they were gone.

Mr. Ziegler: It struck me as curious why she would be interested in these things under the circumstances.

The Court: Curiosity doesn't make something competent.

Mr. Ziegler: If the Court will bear with us just a minute while I consult with counsel.

Q. (By Mr. Ziegler): Loretta, I asked you before if you had planned to run away before you made these charges against your father, and you said, "No"? A. Yes.

Q. (Handing document to Mr. Munson and then to the witness.) Is that your writing?

A. Everything but that.

Q. Everything but what?

A. Everything but this.

(Testimony of Loretta Lindsey.)

Q. That is not your writing? A. Not this.

Q. Is this your writing here underneath it?

A. No. Everything what this says is not my handwriting.

Q. That is not your handwriting. You had a girl friend [114] named Sherry, didn't you?

A. Yes.

Q. Isn't this addressed to Sherry?

A. Yes, it is addressed to her, but I didn't write what that said.

Q. Did you write any part of it?

A. Yes, I did.

Q. Well, what part did you write?

The Court: Well, she said everything except that and point to it. Isn't that enough?

Mr. Ziegler: It doesn't mean anything to me, your Honor. She said, "Everything but that." I asked her if she wrote this, and she said, "Not that" either. A. I said, everything but this.

Mr. Munson: You mean, that part in the block?

A. Yes.

Q. (By Mr. Ziegler:) Well, you want to swear then, as I understand it, that this is not your writing? A. No.

Q. All right. Do you know whose it is?

A. No, I don't.

Mr. Munson: Your Honor, that card that was just shown to the witness, which she says that she wrote everything but the middle block, is certainly not objectionable as far as I am concerned, and I would just as soon it were introduced as [115] an

(Testimony of Loretta Lindsey.)

exhibit so the jury wouldn't get a misconception that there was anything in it that might possibly be damaging to the Government's case.

Mr. Ziegler: Well, if the Court please, if we can establish by other evidence that it is her writing, then we will consider introducing it. If it isn't her writing, certainly, she isn't bound by it, I don't want to introduce something that she didn't write.

The Court: Well, it all depends what you want it introduced for. If you want it introduced for the writing that she admits, why, then it may be admitted now. If you want it introduced for the writing that she doesn't admit, why, of course, it can't be introduced.

Mr. Ziegler: That is correct, your Honor.

Mr. Munson. Your Honor, I would like to—I don't think I made myself quite clear, but the counsel for the defense has brought a couple of cards or something over to this witness and asked her if she admitted or denied them, and this last one she denied writing a portion of that. As far as the Government is concerned, those cards can be admitted into evidence.

The Court: Well, I think he understands that.

Mr. Ziegler: I understand thoroughly, but, if she denies the writing, it doesn't have any effect. It doesn't bind her. If it is somebody else's writing, she wouldn't be [116] bound by it.

Mr. Munson: Do you want to introduce them for what they show?

Mr. Ziegler: If we can establish that it is her

(Testimony of Loretta Lindsey.)

writing, then, of course, we want to introduce them. She isn't bound by what she didn't say or do. That is all, your Honor, on cross examination.

Whereupon the jury was duly admonished and Court adjourned until 10:00 o'clock a.m., November 23, 1954, reconvening as per adjournment, with all parties present as heretofore, and the jury all present in the box; and the trial proceeded as follows:

The Court: You may call your next witness.

Mr. Munson: Your Honor, the Government is not going to redirect on the first witness, and we will call Robert Lindsey to the stand as the Government's second witness. Your Honor, I would like to call the Court's attention to the fact that the exclusion order that was entered heretofore applied only to the complaining witness.

The Court: Well, I am well aware of that. I suppose that the Marshal is also aware of it. [117]

ROBERT LINDSEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson): Would you state your name, please? A. Robert Lindsey.

Q. Speak up a little louder. How old are you, Robert? A. Seventeen.

Q. When did you turn seventeen?

A. Last March.

Q. Are you the brother of Loretta?

(Testimony of Robert Lindsey.)

A. Yes, sir.

Q. And the adopted son of the defendant here?

A. Yes, sir.

Q. You have been formally adopted by him?

A. Yes, sir.

Q. How old were you, do you remember, when you were adopted by him? A. No, I don't.

Q. How long have you lived with the Lindseys?

A. I would say it was when I was—I think I was eleven or ten; I think I was eleven.

Q. Are you living with them now?

A. No, sir.

Q. Where are you living now? [118]

A. Well, I am going to school.

Q. What school?

A. Sheldon Jackson Junior College in Sitka.

Q. Now, I want to direct your attention back to the time when you were living at the Lindsey home and ask you if at any time during that period you noticed anything unusual, anything at all unusual, going on between Loretta and Rolland Lindsey? A. Yes, I did.

Q. Well, would you tell the jury and the Court what it was?

A. Well, I would notice sometimes in the early morning—my father wasn't in most of the time, and, when he did come in, I would notice sometimes in the early morning—he would have to pass my bedroom to get to my sister's bedroom, and I would notice that some mornings he would go up the stairs and come to see if I was asleep, and

(Testimony of Robert Lindsey.)

sometimes I was asleep, and sometimes I played like I was asleep, because I wanted to know what was going on, but I never pressed it any more than I had to, so he would come in and he would look at me and he would make sure that I was asleep, and then he would close the door and he would go down to my sister's room, and he would stay there for, oh—I was just guessing when I said an hour and a half or an hour, sometimes more, sometimes less, but I would try and listen and—— [119]

Q. Well, you say you tried to listen. Did you listen?

A. Well, I tried to, but I couldn't get out of bed because I figured that my bed would make a lot of noise.

Q. Did you hear any noise on those mornings?

A. No; not all the time. Sometimes I heard the bed in her room squeaking, but other than that I couldn't hear anything; I mean, it was just absolute silence; there was nothing.

Q. Did you hear any talking?

A. No. I never did hear any talking at all.

Q. Well, were you still awake on those mornings?

A. Yes, sir.

Q. Did you ever see him leaving?

A. Leaving her room?

Q. Yes.

A. Yes; a couple times. Most of the time he already went downstairs before I was up. Sometimes I would just forget about it and go back to sleep.

(Testimony of Robert Lindsey.)

Q. Did you ever see Loretta leaving her room after one of those occasions? A. Yes.

Q. How would you describe her?

A. Well, sometimes I saw her—sometimes I know she wasn't herself, because she had tears in her eyes sometimes, and other times there was just nothing that I could tell [120] that was out of the ordinary; I mean, it was just strictly nothing.

Q. Well, were there any other times while you were living at the Lindsey home that you noticed peculiar behavior on the part of the defendant Rolland?

A. Well, I would notice when my mother was cooking dinner at times—it was mostly on Sunday—I can recall one Sunday, but I can't recall the date, but it was last spring, and my Dad had sent my sister up to clean her room, and I don't know whether she was cleaning her room or not, but he laid down on the couch and about fifteen minutes later he went up there and he stayed up there, and my mother asked me at the time where Rollie was and then she asked me where my sister was, and I told her they were upstairs, and she didn't press it any further than that, but he stayed up there with her a number of times, but I don't know what he was doing or anything.

Q. He stayed up there, you say, a number of times?

A. Yes, sir; but I don't know what he was doing.

Q. While Victoria was down cooking the dinner?

A. Cooking dinner, yes; and I was down with the children.

(Testimony of Robert Lindsey.)

Q. You were there?

A. Yes; downstairs in the front room.

Q. You were down there taking care of the kids?

A. Well, I was looking after them; yes. [121]

Q. Now, I want to call your attention to a particular incident and have you tell the jury in your own words exactly as you remember it. I am referring to a date on which you were sent on an errand by the defendant to go downtown and when you came back you noticed that the Diamond T was out in the harbor.

A. Well, I had been working on the boat that day, and my Dad said he needed some rags for the boat.

Q. Where was the boat tied up?

A. It was tied up—well, we took it from Thomas Basin, and then we took it down to New England Fish Company.

Q. It was tied up at New England Fish Company?

A. Yes, at the time. And, then, so he went up and called home and he called my sister and he told her to come on and bring some oil rags down for the engine, and then, after she got down there, there was a broken pane of glass in the front of the boat, as I remember it. I think that is what he sent me for, was for a pane of glass, and he told me to go up to Tongass to get it, and I went up to Tongass and I came back, and the boat was out in the harbor drifting, and then after that I don't remember what I did with the glass, but I know that

(Testimony of Robert Lindsey.)

I forgot about it, and then I went uptown and fooled around, and that night I asked him what was the matter, and he said that the engine had stalled, and that is as [122] far as it went. I never pressed it any further than that.

Q. Well, did Loretta tell you what happened that day? A. No, sir. I didn't ask her.

Q. At any time did she tell you?

A. No, sir. Oh, yes, she did tell me when she told me the whole story this year, I mean, this spring; that was just before she made the charges.

Q. What did she say?

A. She told me that——

Mr. Ziegler: Just a minute. I think that is immaterial, if the Court please.

Mr. Munson: Your Honor, the defense counsel yesterday on cross examination asked Loretta who she told the account to of the acts of the defendant.

The Court: But he has already said that she told him, and that doesn't make admissible over objection the details.

Q. (By Mr. Munson): Well, was this sending you on errands an unusual thing or uncommon?

A. No, it wasn't unusual. I didn't recall it until she told me what happened on the boat; I mean, I just forgot about it; a lot of things that I remember, that I forgot about, that after she told me, I knew that there was some connection there, otherwise I had forgot completely about them. [123]

Q. Now, after Loretta, before she made these charges against the defendant, didn't she tell you

(Testimony of Robert Lindsey.)

pretty much the details of the relationship? Did she show you anything? A. Yes.

Q. What did she show you?

A. She showed me that up in her room she had what they call these cotton—we were going to stuff chairs at our house, and she showed me this cotton, and I felt them, and she said there was sperm on them, and I felt them, and they were stiff, and then my grandmother was there; my sister and grandmother and I were there at the time, and my grandmother and I saw them and——

Q. Where were they?

A. They were in her closet in her room.

Q. Did you see anything else?

A. No, I didn't see anything else, except that, well, these two nephews of my Dad's that were staying here with him—Loretta said that he always kept his rubbers up in the wall, I mean, up in the rafters, between my room and her room, and so I went up there and I found this little can of "Trojans", and these two guys with me, they saw me find them up there, and I gave them to my mother, and I have never seen them since.

The Court: Well, what isn't clear is, was this stock of cotton in the closet, or was it only the cotton that [124] was soiled that was in the closet?

A. It was all in the closet.

The Court: All of it? A. Yes.

Q. (By Mr. Munson): Do you recall an evening, oh, sometime this year when you were home and Loretta was home and she was going to make

(Testimony of Robert Lindsey.)

a book report on a book, "Seventeen" by Booth Tarkington? Do you recall that evening?

A. Yes. I gave her the book, and she was going to make a book report on it, and I happened to be on restriction at the time. That was one of the times when I really got suspicious of what was going on, because I know I was on restriction, and he never did let me go to a show on a school night, and that night he gave me a dollar and he told me I could go to the show, and my sister was home alone with him, and I got pretty suspicious then. I wanted to know just what it was. And then there was another incident that was on New Years, last New Years, that I was home; I tried to stay home, and he sent me out, and I came back, and he sent me down to the drugstore for some film and he told me that I didn't have to come back right away, but, when I did come back from playing, the doors were locked and the blinds were pulled, and we had the Christmas tree in the house at the time, but I couldn't see any reason why he wanted to pull [125] the shades down, and he came to the door and then he gave me some money and he sent me downtown. That was when I really got suspicious.

Q. When he came to the door did you notice anything about him that was unusual?

A. Yes. I noticed his pants weren't zipped up all the way. That is one thing I did notice then, and then I kind of got suspicious and I asked my sister about it after that, and she didn't tell me anything about it.

(Testimony of Robert Lindsey.)

Q. And where did you go?

A. Me? I went down to the Federal Drug to get some film. That was last New Years.

Q. Can you recall instances of being placed on restriction and then suddenly having the restriction lifted for some reason or another by the defendant?

A. Well, I could recall that one time, but there is other times that I couldn't recall. I probably could if I thought about it a long time, but I couldn't recall them offhand though.

The Court: Well, you mean, you can recall the occasions, but you can't recall the time, or what?

A. Well, I can't recall the occasion. Maybe I could recall the occasion, but I can't recall the time because maybe there was——

The Court: You weren't asked for the time; but can [126] you recall such occasions?

A. No, I wouldn't say that I could.

Q. (By Mr. Munson): I want to get something clear, Bob. I don't know whether you said or not, but, going back to these early morning visits you testified to, when Rollie Lindsey would come upstairs and go in your room and check to see if you were asleep, did he or did he not close the door of your room? A. He did.

Q. He would close it?

A. Sometimes he wouldn't even come to my room. He would just listen on the outside, and then go to her room.

Q. Did you recognize his footfalls or footsteps?

A. Yes.

(Testimony of Robert Lindsey.)

Q. You knew how he walked?

A. Yes. Well, it couldn't have been anybody else. I didn't see him all the time, but I took it for granted that it was him, because I don't see who else it could have been.

Q. Did you, on those mornings, did you ever happen to be lying in such a way that you could look over and see Rolland Lindsey? Did you actually see him?

A. I saw him. I can recall three or four times, but there might have been more though. I would say there were three or four times because I know there were three or four times, but there could have been more times. [127]

Q. That you actually saw him? A. Yes, sir.

Q. And saw him going over to her room?

A. Yes, sir.

Mr. Munson: That is all the direct examination.

Cross Examination

Q. (By Mr. Ziegler): Robert, have you talked to anybody about this case?

A. I have talked to Mr. Munson.

Q. Anybody else? A. This guy here.

Q. Who?

Mr. Munson: You mean Mr. O'Connor?

A. The District Attorney's assistant; yes.

Q. (By Mr. Ziegler): Was it "this guy here"?

A. Yes.

Q. Robert, how many times have you run away from home while you were living there?

(Testimony of Robert Lindsey.)

A. Oh, about, maybe seven or eight times; maybe more.

Q. And what was the trouble?

A. I couldn't get along with my mother.

Q. And how did you get along with your father?

A. Fine.

Q. You ran away seven or eight times on account of you [128] couldn't get along with your mother?

A. Well, yes; I couldn't get along with her. She was always making accusations.

Q. Now, does that have anything to do with your feeling in this case?

A. No, sir; it doesn't. I still like my father and I——

Q. Notwithstanding all you have heard about him here, you still like him?

A. Yes, sir. He has done a lot for me.

Q. All right. You mean to say then—you heard your sister tell all these times when he has ravished her, didn't you?

A. Yes.

Q. And that is a pretty bad thing, isn't it?

A. Yes.

Q. And you still like him?

The Court: He just got through answering that question.

A. I told you I liked him.

Q. You have been convicted of a crime?

A. I have never been convicted of any crime.

Q. You have not?

A. No, sir.

Q. Well, are you on parole or anything of that kind?

A. No, sir. [129]

(Testimony of Robert Lindsey.)

Q. How about this case of you and the Basso boy?

Mr. Munson: I object, your Honor. He said he was not convicted of a crime.

The Court: Well, the only question you can ask him is whether he was convicted of a crime.

Q. (By Mr. Ziegler): When did you leave the house, Robert? A. When?

Q. The last time.

The Court: You mean, when he left home?

A. I left home in April. I think it was April the twenty-fourth or third.

Q. Now, when is the last time before that that you saw your father go into the bedroom?

A. I don't remember. It might have been a month; it might have been a week. I didn't keep track of them; as I told him, I forgot about them; some of them I remember.

Q. Well, could you tell the jury how many times it was in the last year before you left?

A. Maybe ten times; maybe fifteen; it might have not been that many; maybe I am exaggerating, but that is——

Q. Now, what time of the night did this occur?

A. I am not talking about night now. You were just talking about in the morning.

Q. Oh. Well, what time in the morning?

A. Oh, six or seven o'clock, before everybody was up. [130]

Q. How do you fix that time?

A. I could tell.

(Testimony of Robert Lindsey.)

Q. Well, that is what I am asking you. How do you fix it? How do you tell?

A. Well, I don't know how I can fix it; but I know that my Dad and I, whenever he was in town, we would generally go to work on the boat and we would get up at eight, and it would always be before. I figured it would be an hour or two hours before that. I couldn't say, because there wasn't a clock in my room, but I could just imagine it might have been. Maybe it was three o'clock in the morning for all I know.

Q. And it could have been seven or eight o'clock in the morning?

A. It could have been; yes.

Q. And were people up around the house at seven?

A. No, sir; they weren't.

Q. There is three young children there?

A. Yes, sir. They never did get up until—well, they always slept late.

Q. And what time did you have to get up and go to school?

A. Me?

Q. Yes.

A. I always got up about seven-thirty or eight o'clock.

Q. And Loretta too? [131]

A. Yes. But on any of these mornings that he went in her room I can only recall one instance when it was on a school day.

Q. And your recollection as to time is simply, as I understand it, is but an estimate; you guessed it was a certain time?

(Testimony of Robert Lindsey.)

A. Yes. I couldn't tell.

Q. You said you heard no talking on these occasions?

A. I never heard a sound.

Q. And how far is your room from there?

A. About from here to that wall there.

Q. I see. And your room was as far from where you are sitting to this wall?

The Court: He just got through saying that. There is no use of repeating these things.

Mr. Ziegler: Well, I think it might be very important, if the Court please, and that is the reason I want to establish it definitely.

The Court: There is no use of repeating something he has just got through answering. You will never make any progress.

Q. (By Mr. Ziegler): Was your door open on these occasions, the door to your room?

A. No. I always closed the door before I went to bed.

Q. Yes. And how about when your father came in and went out? [132]

A. Well, the door was always closed; I mean, he didn't leave it open, if that is what you mean.

Q. Yes. Well, I thought you said sometimes he came and looked in through the door?

A. Well, sometimes he did just come and look in the door. That was when I didn't have a door into my room. I didn't always have a door there, because the upstairs of the house wasn't finished.

Q. You say you didn't have a door?

A. No, I didn't for a while.

(Testimony of Robert Lindsey.)

Q. When was that time, that you didn't have a door on your room?

A. Well, that was when the house was first built, and I think the house was built in 1951, because I remember we had a good season in '50, but I think it was about 1951 when I first moved upstairs.

Q. When you first what?

A. When I first moved upstairs.

Q. Before 1951 where were you sleeping then?

A. Oh, I was sleeping downstairs.

Q. All right. Now, when you first moved upstairs then—I want to get straight on this—was there a door to your room?

A. When I first moved up there?

Q. Yes. [133]

A. I told you there wasn't.

Q. All right. Now, you moved up there about 1951?

A. About that; maybe '50; I can't place the year.

Q. Well, when was the door put onto your room?

A. In about 1952; maybe '51.

Q. Now, did any of these things that you testified to happen before the door was put on your room? A. Yes. I told you they did.

Q. And he came there and looked into your room with the door open and you heard him go into Loretta's room?

A. Yes; but I told you it wasn't very many times, because he put the door on the room, and

(Testimony of Robert Lindsey.)

then he would come in; he would look in the door and then he would go to her room.

Q. Well, how did he look in the door?

A. He just looked around. I didn't see him most of the time. Part of the time I was turned over in my bed. Sometimes I would just hear him, and I would see him go in my room, and then I would hear him go down to her room, and he would stay in there, and I would fall asleep again. I didn't pay no attention to it at the time.

Q. Now, you have testified to one instance with respect to the boat down at Thomas Basin?

A. Yes.

Q. And you were sent on an errand uptown?

A. Yes.

Q. And when did you get back?

A. After I got the errand done with.

Q. And where was the boat then?

A. It was out in the harbor drifting.

Q. Drifting out in the harbor? A. Yes.

Q. And how long was it before the boat got back?

A. I don't know. I went uptown and fooled around and didn't pay no more attention to it except that night.

Q. And you don't know then how long the boat was drifting out there?

A. No, I don't. I just saw it and I figured there was something the matter and I went back into town and fooled around. I didn't come home until that night.

(Testimony of Robert Lindsey.)

Q. If you figured that there was something wrong, why didn't you report it?

A. Because I didn't think it was necessary or I would have.

Q. Well, Robert, ordinarily, have you ever seen other boats drifting out in the channel?

A. Yes.

Mr. Munson: I object, your Honor.

The Court: Objection sustained.

Q. (By Mr. Ziegler): Where was the boat when you saw it drifting, when you claim you saw it drifting? [135]

A. When I saw it drifting?

Q. Yes. A. Out here.

Q. Well, where was it with respect to——

A. It was right at the end of Pennock Island, right near the rock pile.

Q. Near—was it down toward New England?

A. No. It was this way.

Q. North, you mean? A. Yes, sir.

Q. Up near the Northern Machine Ways?

A. It was out here. I told you it was right off the end of Pennock Island. It wasn't down by Northern Machine Ways. It was right here off Pennock Island. It wasn't very far.

Q. Well, I am just trying to clear up, Robert, your recollection of where the boat was with respect to anything in town.

A. I told you it was right abeam of Pennock, at the end of Pennock Island, right by the rock pile, and there is a big rock pile right at the end of the Island.

(Testimony of Robert Lindsey.)

Q. That is the north end of the Island?

A. That is right here, down here. You can almost look straight across.

The Court: Well, we have been on that long enough. Let's go to something else. It is immaterial anyhow. [136]

Mr. Ziegler: Well, if it is immaterial, then, the Government, if the Court please, brought it out.

The Court: The exact location of this boat at that time, the precise location, or the direction of the compass are all immaterial.

Mr. Ziegler: If the Court please, I think——

The Court: Well, I have already ruled on it, and I think we are just wasting time, so you will have to go to something else.

Mr. Ziegler: Well, I would like to state to the Court my reason for wanting to fix it very definitely.

The Court: Well, I have ruled on this and that ends it.

Mr. Ziegler: I see.

The Court: We are going to be here a week if we go along at that rate.

Q. (By Mr. Ziegler): Now, Robert, you testified with respect to these rubbers?

A. Yes.

Q. Tell me about that.

A. She told me they were up in the rafters, and I went up and got them.

Q. Who told you?

A. She did; my sister.

(Testimony of Robert Lindsey.)

Q. And you got the rubbers? [137]

A. I didn't get any rubbers. I got an empty can of rubbers.

Q. An empty can of rubbers?

A. Yes, sir.

Q. And where did you find them?

A. I found them right where she told me they were, right up in the rafters.

Q. Did you tell your grandmother and Mrs. Lindsey?

A. Yes; and I gave them to Mrs. Lindsey, and I have never seen them since.

Q. Now, did you give her any rubbers?

A. No. I gave her the empty can.

Q. All right. A. I told you that.

Q. Did you tell them, Robert, that there were rubbers all over the rafters up there?

A. No, I didn't.

Q. Are you sure of that?

A. Maybe I did at the time, because I was mad, but, if I did, I didn't mean it. I can't remember what I said then.

Q. You don't remember what you said then?

A. I might have said what you just said I said, and I might not have.

Q. Now, Robert, do you remember the time, or, I will ask you, do you remember the time your father found a can of rubbers that you had up there? [138]

A. No, I don't. He never did, or else he didn't tell me about them if he did.

(Testimony of Robert Lindsey.)

Q. And then, let me ask you the question now, didn't he find in your room a can of rubbers?

A. No, he didn't.

Mr. Munson: I object to this, your Honor. I don't see where it bears on the issue.

The Court: Objection overruled.

Q. (By Mr. Ziegler): A box of rubbers?

A. He never did find any in my room. I didn't take them around with me.

Q. Well, I am asking you the question——

A. And I just told you the answer.

Q. ——you said that—as I understand it then, you are claiming now that you never had any rubbers in your room?

The Court: Well, the rubbers in his room, if any, would have to be connected with the rubbers in the rafters, otherwise his conduct is not under investigation here. In other words, you should ask him, if that is what you are driving at, whether those rubbers that he claims, or the containers for them, that he found up in the rafters were not in fact those that he had in his room, and then that would connect it up, but otherwise his conduct here with reference to rubbers is not under investigation.

Mr. Ziegler: Well, if the Court please, he hasn't [139] said there were any rubbers in the rafters. He said there was a can up there.

The Court: I mentioned container in my statement just a moment ago. That is, if you want to show that what he found up there was something he had had in his room, why, you may do so, but

(Testimony of Robert Lindsey.)

you may not show something independent of it and raise the collateral question of the conduct or behavior of this witness.

Q. (By Mr. Ziegler): Robert, when you first started living upstairs, you and your sister slept in the same room, didn't you? A. No.

Q. How is that?

A. I said, we didn't. We slept in the same room when we were downstairs.

Q. I see. When you were downstairs?

A. Yes.

Q. You slept in the same room? A. Yes.

Q. And how old were you then?

A. Oh, I guess I was eleven or ten, and my sister was eight. She got to be about twelve, and I was—maybe she was eleven and I was thirteen when we moved upstairs.

Q. And up until that time then you slept in the same room? A. Yes, sir. [140]

Q. Now, you testified, Robert, about New Years. Was that last New Year's Day? A. Yes, sir.

Q. And you stated that your father sent you to the store, the drugstore? A. Yes, sir.

Q. And what time of the night was that?

A. It was about five o'clock.

Q. Five o'clock when? In the afternoon?

A. You said night. I told you, five o'clock at night.

Q. Five o'clock in the evening. All right. Now, who was at the house when he sent you out?

(Testimony of Robert Lindsey.)

A. There was my sister, Rollie, Randy and Janice, and I guess Pat was born then.

Q. Who?

A. The little one, the smallest one. I think he is eight months. I don't know whether that would put him born in January or not. I don't remember his birthday.

Q. Well, where was your mother?

A. She took the kids and went over to my Aunt Myrtle's place.

Q. Well, then the kids weren't there?

A. Well, I thought they were there, but maybe they weren't there. Now that I remember, I think she took them and she went over to my aunt's, her sister's place.

Q. How is that? [141]

A. I think she took them and she went over to her sister's place.

Q. And what sister? What is the name of her sister? A. Myrtle.

Q. Myrtle who? A. Wiley.

Q. I see.

A. I said before that the kids were in the house, because I thought that they were, but, now that I remember, they weren't. She took them with her.

Q. And how long was she away?

A. Oh, I don't know. I couldn't say because—well, let me see—I could too. A couple hours or a couple hours and a half. That is how long I was away. She left when I did, and I didn't come back

(Testimony of Robert Lindsey.)

until she did. No. I came back before she did, come to think of it.

Q. And you were away, uptown to the drug-store, from around five to seven or seven-thirty?

A. No. I told you. I was in the house fooling around. I just come from the boat. I had come home, and he was home, and my mother had just gone out. She had taken the children with her. I was lounging around, and he told me to go out and play. I told him it was too dark. That is when I got suspicious. I told him it was too dark to go out and play. He said, "Go out and play [142] anyway." I went out and played for a half-hour. I came home, and he sent me down to the drugstore. It might have been two hours. It might have been five hours.

Q. It could have been five hours you were away then?

A. Oh, five hours—it could have been anywhere between two and five hours. I don't know. I didn't keep track of the time. I don't have a watch with me every minute.

Q. Well, then, as I understand it, you were sent down to the drugstore around five o'clock in the evening and you could have been on that mission from two to five hours? A. No.

Mr. Munson: Your Honor, I object to this harassing——

The Court: The objection is sustained as repetitious.

Q. (By Mr. Ziegler): Now, when did you have your dinner that day, New Year's Day?

(Testimony of Robert Lindsey.)

Mr. Munson: I object as immaterial, your Honor.

The Court: Objection sustained.

Q. (By Mr. Ziegler): Now, Bob, getting back to the restrictions you talked about, Mr. Munson asked you about certain restrictions. What were these restrictions for?

Mr. Munson: I object as immaterial, your Honor.

The Court: Objection sustained.

Mr. Ziegler: Counsel brought it out himself, your Honor. [143]

The Court: It doesn't make any difference. If counsel brings out something that is immaterial and you don't object to it, that doesn't give you a right to pursue it over his objection.

Q. (By Mr. Ziegler): You related something about running away, Bob. Where did you go to when you ran away?

Mr. Munson: I object as immaterial, your Honor.

The Court: Objection sustained.

Q. (By Mr. Ziegler): Robert, with respect to your testimony, you said you couldn't get along with your mother? A. Yes.

Q. And what was the reason?

A. Because she was always accusing me of things that she said I was going to do that I never did.

Q. And they were always——

A. They were always accusations, or she was always making insinuations.

The Court: Well, now, I want to call attention to the fact that this witness' conduct or behavior is not under investigation here.

(Testimony of Robert Lindsey.)

Mr. Ziegler: Well, if the Court please, can't we explore into his feeling and attitude——

The Court: Toward the defendant, but not toward his mother.

Mr. Ziegler: How is that? [144]

The Court: Toward the defendant, but not his mother.

Mr. Ziegler: I see. I think that is all, if the Court please.

Mr. Munson: No redirect, your Honor.

The Court: Call your next witness.

DONALD RAYMOND RIEWOLD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson): Would you state your name please? A. Donald Raymond Riewold.

Q. Where do you live?

A. 1048 Woodland.

Q. Is that near the home of the defendant?

A. Yes. It is across the street about two doors down.

Q. How long have you been in Ketchikan, Mr. Riewold? A. Two and a half years.

Q. Two and a half?

A. Two and a half years.

Q. Are you acquainted with the defendant?

A. I have met him; I mean, I met him two or three times, I believe; maybe three or four.

(Testimony of Donald Raymond Riewold.)

Q. Do you know the complaining witness—Loretta?
A. Yes, I do; very well. [145]

Q. How do you know her?

A. I know her as she used to baby-sit for us.

Q. Do you recall a conversation that you had with Loretta some months ago?

A. Yes, sir; I presume it is the one bearing on this case.

Q. Yes. You made a statement to the United States Marshal?
A. Yes.

Q. Have you see it since?

A. No, I haven't.

Q. Would you like to refresh your memory?

A. Yes. As far as conversation goes, as far as dates, I may be a little balled up if you asked me, if somebody starts asking me that. It has been quite a few months.

Q. Well, suppose I tell you that the dates mentioned here are April 10th and April 13th?

A. Yes, I think so.

Q. Do you remember those?

A. Yes, I think so.

Q. Without reference to this?

A. I think so; yes.

Q. Would you tell the Court and jury, exactly as you remember it, the incidents that occurred on those dates and times?

A. Well, Loretta came over to the house and she was crying and she was quite upset and she accused—what I thought was her father; I didn't know the relationship at the [146] time—and she

(Testimony of Donald Raymond Riewold.)

accused her father of having sexual relations with her, not only that but abnormal relations with her.

Q. What do you mean by that?

A. Well, I don't know how to explain it to the Court.

Q. You mean abnormal sexual relations by means of the mouth? A. Yes.

Q. She said that she had had relations like that with the defendant?

A. She said they were forced on her, yes; and she asked me if she could call her mother, and that was the first I knew that Mrs. Lindsey or Mr. Lindsey weren't her mother and father. I had no knowledge of that whatsoever before, so I didn't know whether to believe the kid or not at the time, but she was just a kid and come over and told me that, and she asked if she could call her mother, and I said, yes, of course, and I told her to go in and use the phone. At the time I was sick in bed. I am in the Coast Guard, and I was home in bed sick, and my wife was—I don't know whether my wife was there or not, to be honest with you. In the statement it probably would say. But anyway she was in the kitchen and she didn't hear this conversation, and I told her to go ahead and call her mother, so she went ahead and called Seattle, who I thought was her mother, and, subsequently, I found out that evidently it was not her mother, and she told her about it, and then she asked me what to do, and I told her to go to the District Attorney here in Ketchikan, which I didn't know it was a Federal case; I

(Testimony of Donald Raymond Riewold.)

told her to go down and see the City Attorney.

Q. Well, do you know why she was crying that day, Mr. Riewold?

A. Yes, sir; I do. From what she told me, I do.

Mr. Ziegler: What was the answer?

A. From what she told me. I don't know, myself; no. I don't know why she was crying. I just know from what she was telling me. She was crying because she was upset because of the relationship between her and Rollie.

Q. (By Mr. Munson): Was that the only time you ever saw her crying?

A. Yes; I think, I mean, as far as I can remember; yes.

Q. Would you like to refresh your memory now from this statement?

A. Yes; if I left something out, I imagine I should. (Looking at document.)

Q. Now, I would like to ask you if you remember now what caused Loretta to cry that day?

A. Is it in the statement?

Mr. Ziegler: Just a moment, if the Court please. I think he first should be asked whether he does know what [148] caused her to cry.

Mr. Munson: I thought he just answered that.

The Court: Well, I think what you should do is—if his recollection fails him in any particular, you have a right to call his attention to the specific thing that you want to bring out, and, if he doesn't remember it then, when you call his attention to it, you can show him the record.

(Testimony of Donald Raymond Riewold.)

A. I don't know what you are trying to bring out, to be honest with you.

Mr. Ziegler: What was the answer?

A. You asked me if I knew what made her cry that particular day?

Mr. Munson: Yes.

A. Well, as I gathered, it was just the accumulation of what had been happening, and she didn't want to go back home because she was scared. I mean, I don't know the actual reason, but she was awfully, to put it bluntly, shook up, I guess you would say.

Q. Did she tell you, did she have a long talk with you and go into great detail?

A. Yes, she did.

Q. Give us an idea of what she said, will you?

Mr. Ziegler: If the Court please, I don't think that it is proper.

The Court: Well, do you object to it? [149]

Mr. Ziegler: Yes, I think we better object to it, if the Court please.

The Court: Well, I think the objection will have to be sustained. This is on—what was it—April 11th or 13th?

Mr. Munson: April 10th.

The Court: It isn't any of the dates that are alleged in these counts.

A. She gave me the dates at the time, but I don't remember them, your Honor.

Mr. Munson: I wasn't so much concerned with the *res gestae* aspect of it so much as the fact that

(Testimony of Donald Raymond Riewold.)

the defendant on cross examination of Loretta had brought out the fact that she had made prior consistent statements to various people, and I still think that the door has been opened to giving the prosecution an opportunity to tell what she told these people.

The Court: I don't think so. He has a right to ask her whether she has made statements to anybody else for the purpose of testing her credibility, but that doesn't open the gate to the reception of what she said over objection.

Mr. Munson: Your Honor, I don't think I have made myself clear yet on this point. The cross examiner yesterday in cross examining Loretta tried to indicate, either consciously or otherwise, that, when she told some of the people, including the United States Commissioner at the preliminary hearing, about the conduct of the defendant, that she had not [150] included sodomy and threw that cloud on her testimony. I believe I am entitled to have at least one or two of the eight or ten people that she talked to come up here on the stand and dispel that.

The Court: Well, I am frank to say that I don't recall the testimony on that point. You mean that she was questioned as to whether she had ever told anybody that the defendant had committed sodomy upon her?

Mr. Munson: He asked it in this way—"You didn't mention anything about sodomy then, did you?"

(Testimony of Donald Raymond Riewold.)

The Court: Well, what was her answer? Did she deny it or——

Mr. Munson: I think she said that she didn't remember whether she did or not.

Mr. Ziegler: Well, that disposes of it, I should think, your Honor.

The Court: Well, I think that the evidence would be admissible, but only the fact that she mentioned the offense of sodomy.

Q. (By Mr. Munson): Mr. Riewold, when Loretta talked to you in April, early in April, on April 10th, did she mention that Mr. Lindsey——

The Court: He has already testified to that.

Mr. Gilmore: That would be our objection. The same question was asked, and the answer was given. [151]

Mr. Munson: No further questions.

Cross Examination

Q. (By Mr. Ziegler): Mr. Riewold, all you know about is what Loretta told you? A. Yes, sir.

Q. You don't have any knowledge whatsoever of whether or not the statements she made to you were true, and you don't pretend to?

A. No, I don't pretend to, except from the reputation that the child gained from working for me for seven months. I believed her when she told me at the time.

Q. You knew nothing as to her disposition——

A. No, sir.

Q. ——for truthfulness or untruthfulness?

(Testimony of Donald Raymond Riewold.)

A. No. I have no idea of that whatsoever, sir.

Q. Have you talked to Mr. Lindsey about the case?

A. Yes, sir. I went over and—the only conversation I had with Mr. Lindsey—I called the District Attorney and told him also. I came down and asked him, and he told me that I didn't have to testify, and I went over to Mr. Lindsey and told him that I was very happy that I didn't have to get mixed up in the case and that I didn't have to testify, and, when the District Attorney called me Sunday night, I called Mr. Lindsey back and told him that I did [152] have to testify because the District Attorney called me and told me I did.

Mr. Ziegler: That is all.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows:

FLORENCE DALTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson:) Will you state your name please? A. Florence Dalton.

Q. Where do you live, Mrs. Dalton?

A. 639 Deermount Avenue.

Q. How long have you lived in Ketchikan?

(Testimony of Florence Dalton.)

A. All my life.

Q. Would you state your relationship to the complaining witness? A. I am her aunt.

Q. And your relationship to the defendant?

A. He is my brother-in-law.

Q. Now, do you recall making a statement last April to the United States Marshal? [153]

A. Yes.

Q. Do you recall what that was about?

A. Well, I told about how, when I was twelve years old and I was baby-sitting for——

Mr. Ziegler: Just a moment, if the Court please. I object to that. Apparently it is something with respect to the family, with respect to the defendant.

The Court: Well, I don't know what it calls for, but, apparently, it is hearsay and wouldn't be admissible.

Mr. Ziegler: When she was twelve years of age, of course, was a long while before the inception of this case.

Mr. Munson: Your Honor, I heard his objection, but I didn't get the Court's ruling.

The Court: Well, it is very difficult for the Court to rule on an objection, whatever it was, because you haven't stated the purpose of the offer, and it doesn't appear from your question.

Mr. Ziegler: I suggest, if the Court please, that he approaches the bench and tells the Court.

The Court: Well, I don't know whether it is going to be improper for him to state the purpose of the offer. He is the judge of that, in the first

(Testimony of Florence Dalton.)

instance at least. There is no use of coming to the bench if it is something that may be stated without prejudice.

Mr. Munson: Well, the question that I asked was [154] purely a preliminary question. I just wanted her to state——

The Court: Well, if it is a preliminary question, why, go ahead.

Mr. Munson: I just wanted her to state what the event was that brought about this statement to the Marshal.

A. Oh, you mean after Loretta told me about all what happened about this case?

Mr. Munson: Yes.

A. It was before Easter, a few days before Easter, she came and told me that Rollie had had these relations with her, and she said she was getting tired of it, and she said that——

Mr. Ziegler: Now, if the Court please, I object to any further testimony.

Q. (By Mr. Munson): Would you confine yourself to what she said about sodomy?

A. Oh. She told me that Rollie had——

Mr. Ziegler: I have the same objection, if the Court please.

The Court: Well, the only thing she could be permitted to state is that she made a complaint about the commission of sodomy on her, and that is all, and not the details.

Q. (By Mr. Munson): Did Loretta complain to you, mention to you, that the defendant, Rollie

(Testimony of Florence Dalton.)

Lindsey, had been having unnatural relations, sexual relations, with her? [155]

A. Yes, she did.

Q. By means of the mouth? A. Yes.

Q. Now, Mrs. Dalton, I want you to go back in your memory now and tell the jury and the Court if you recall having any experience with the defendant?

Mr. Ziegler: Now, if the Court please, we object to that as absolutely immaterial and highly prejudicial to the defendant.

Mr. Munson: Your Honor, I believe that this is admissible to show motive, pattern, intent— -

The Court: But not until after there has been, not until—evidence of this kind is admissible only on rebuttal after the defense has put in issue the matter of intent or disposition or system or anything of that kind.

Mr. Munson: May I approach the bench, your Honor?

The Court: Yes.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred:

Mr. Munson: Your Honor, I believe this witness' testimony can show very definitely the tie-up with the defendant in so far as his whole psychology and behavior, and also the fact that he uses certain expressions that have already been testified to on direct examination and which [156] would be clearly admissible to show his motive and pro-

(Testimony of Florence Dalton.)

propensity. I don't see that that—although we can put it in, as far as rebuttal evidence is concerned, I think it is good direct evidence, another crime, to show propensity to commit this crime.

The Court: I doubt whether it is admissible in this state of the case because right at the present time there isn't anything equivocal about the evidence so it would put the matter of intent into issue. I think you have to wait until the defendant has made it an issue.

Mr. Ziegler: It would result in an entirely new case.

The Court: That is always the case when you permit evidence of other offenses, but it is only admissible where the question of intent is put directly in issue, or system or motive, and there is nothing in the case that makes an issue of any of those things.

Mr. O'Connor: I think we can put her on as effectively in rebuttal.

The Court: If you had any authorities for the proposition in a situation such as this, you could introduce, as part of your case in chief, evidence of other offenses, you could call them to my attention.

Mr. Munson: It is immaterial when it comes in.

Whereupon respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury; and the trial proceeded as follows:

Mr. Munson: No further direct examination.

Mr. Ziegler: No cross examination.

The Court: Do you have your next witness?

Mr. Munson: The next witness is a doctor, and Mr. O'Connor has just gone down to contact him again. We have been trying to reach him for the last half-hour or so, and I think he will be here.

The Court: Well, was he asked to be here at a particular time?

Mr. Munson: He was asked to be here around this time, your Honor, if he could possibly make it. Your Honor, while we are waiting for Doctor Stagg, I would like to put on Doctor Anderson as the next Government witness.

CHARLES L. ANDERSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson): Would you state your name please? A. Charles L. Anderson.

Q. And would you state your profession?

A. I am a physician.

Q. How long have you been a physician, Doctor?

A. I finished medical school in 1940.

Q. And you have been practicing medicine ever since? A. Yes, I have.

Q. Where are you practicing now?

A. Well, I am employed by the Territory of Alaska. I am Chief of the Section of Mental Health of the Alaska Department of Health, and I have my headquarters in Anchorage.

(Testimony of Charles L. Anderson.)

Q. How long have you been in Anchorage, Doctor?

The Court: Just have the Doctor state his qualifications, and then you won't have to ask him all these questions.

Q. (By Mr. Munson): Doctor, would you briefly state your qualifications as a physician and as a mental health expert and your degrees?

A. I was graduated from medicine in 1940. After a year of internship, I began a residency in psychiatry. I began that in 1941. After I completed that residency in psychiatry, I had two years in the practice of psychiatry, and in 1946 I was qualified by examination as a specialist in the field of psychiatry, and I have continuously practiced since then. I was an assistant clinical professor of psychiatry at the medical school at Ohio State University until 1952 when I came to Alaska.

Q. Your original medical degree was from Ohio State University? [159]

A. No. It was from the College of Medical Evangelists in Los Angeles.

Q. Well, Doctor, did you have occasion last April to see or talk to the complaining witness in this case, Loretta Lindsey? A. Yes, I did.

Q. And do you recall what your examination of her revealed, what she told you concerning this present case?

A. Well, that was on the 28th of April, 1954. She was sent to me.

Mr. Ziegler: I think it calls first for an answer

(Testimony of Charles L. Anderson.)

—yes or no. The question of what she told him would be another question.

The Court: I don't remember the question now.

Mr. Ziegler: The question was, "Do you recall what she told you about the case?"

A. That answer is yes.

Q. (By Mr. Munson): Would you tell the jury and the Court what she did in fact tell you?

Mr. Ziegler: Now, if the Court please, we object to that as immaterial.

The Court: Well, it is probably not immaterial, but I think it is inadmissible.

Mr. Munson: Again, your Honor, I wish to restrict the testimony to the aspect of sodomy, which—— [160]

The Court: Well, you will have to eliminate all details. The question would just simply have to call for whether there was a complaint made as to sodomy.

Q. (By Mr. Munson): At the time that you examined this girl and talked to her, did she complain or make statements indicating that her adoptive father, the defendant in this case, had had sodomous relations with her?

A. Yes, she did.

Mr. Munson: I presume that is the extent that I can go into it. I have no other questions.

The Court: Is your other witness here now?

Mr. Munson: He will be here in ten minutes, your Honor.

Mr. Ziegler: I have no questions, if the Court please.

The Court: Well, perhaps, then, we better take a recess until he arrives.

Mr. Munson: He is due at eleven-thirty, your Honor.

The Court: We will recess then subject to call when the witness arrives.

Whereupon Court recessed subject to call, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows: [161]

DOCTOR LEE STAGG

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson:) Would you state your name please?

A. Doctor Lee Stagg.

Q. Where do you live, Doctor Stagg?

A. I live here in Ketchikan, 2619 Third Avenue.

Q. What is your profession?

A. Doctor of medicine.

Q. How long have you been practicing?

Mr. Ziegler: We will admit the Doctor is a qualified physician.

Q. (By Mr. Munson): How long have you lived in Ketchikan, Doctor? A. Sixteen years.

Q. I would like to direct your attention to a date, April 23rd of this year, and an examination that was made upon the complaining witness in this case, Loretta Lindsey, and have you tell the Court

(Testimony of Doctor Lee Stagg.)

and jury about the examination, how it was made, and what in your opinion the examination revealed about this girl.

A. All right. The girl, Loretta Lindsey, came in with her aunt, and the aunt talked to me before the examination and told me somewhat of the case and asked if I would [162] examine her and find what I could about her. The examination itself, leaving the history out, revealed the external genitalia of the girl to appear of the adult type in development. The opening, or introitus, admits two gloved fingers with ease, with no resistance from the hymenal ring whatever. The pelvic organs are normal in size, and there is no evidence of pregnant uterus. The cervix appears normal. There was no pain or resistance met with on using my large speculum to examine the vagina and the cervix. My impressions were that these findings were the same findings as in any married lady having regular relations.

Q. Doctor, you say that you used a large speculum?

A. Yes. We have three sizes of speculums. The one that we ordinarily use is a medium-sized one in the office. Occasionally in larger females we use a large speculum, and in a small virgin we use a virginoscope.

Q. Do you have those different types of speculum with you? A. Yes, I have.

Q. Would you exhibit them to the jury and ex-

(Testimony of Doctor Lee Stagg.)

plain which one you used in the examination of this girl?

A. We use this to examine the cervix and the vagina, and in a virgin the hymenal ring is the resistance usually met with, although the perineal body does come into play somewhat, but this is the small speculum used in examining [163] virgins and smaller girls. This next one is the medium-sized speculum that I use almost entirely in the office in examining the cervix and the mouth of the womb and the vagina for evidence of disease. And this speculum is the large-sized speculum. It is used in an obese person, where they are—or one having a cystocele or erectocele, where the vaginal wall folds in and it is hard to visualize the cervix, and I use that to get a little bit more exposure so that I can see what we are doing.

Q. And which one of those specula was used in the examination of this girl?

A. I used this one in the examination of the girl.

Q. And she didn't fall into this category of obesity or——

A. No. I used it because of the laxity that was present in regard to the hymenal ring and the perineal muscles.

Q. That laxity, did you just testify that that laxity would be the kind you would find in an adult married woman used to sex routine, regular sexual intercourse?

A. That is right.

Mr. Munson: No further direct examination.

(Testimony of Doctor Lee Stagg.)

Cross Examination

Q. (By Mr. Ziegler): Doctor, you don't pretend to tell the jury in your [164] testimony, as I understand it, from the condition you found as to who was responsible for that condition?

A. No.

Q. And is that condition, can that condition be caused by the use of other objects than from intercourse?

A. You ask a hard question. It is really a little bit difficult one to answer because, having seen a young lady for the first time under those conditions, the young lady is usually on quite a nervous tension and strain, and they usually fight with their knees and contract their muscles. I feel that the hymenal ring could be in that condition all right because of other objects; yes.

Q. By the use of other objects?

A. By the use of other objects. But I do not see how there could have been relaxation of the vaginal wall and of the perineal body by the use of other objects.

Q. Do I understand you then that by the use of other objects it couldn't produce this same condition?

A. I don't see how it could. I mean, I don't think I have ever seen the condition, Mr. Ziegler.

Q. Would you say positively that it couldn't?

A. I don't know as I am qualified to make a statement like that.

(Testimony of Doctor Lee Stagg.)

Q. What you have testified to now is your opinion only?

A. What I have testified to is my experience.

Q. Now, in your experience, what has it demonstrated to you with respect to young girls using artificial means of masturbation or intercourse?

A. Using artificial means of masturbation——

The Court: Well, what is this now? I think it is getting pretty remote, what his opinion might be with other girls, unless it throws light directly on the condition of the prosecuting witness here. It is too broad.

Q. (By Mr. Ziegler): Well, what I am trying to develop, Doctor, if it is true, whether this condition you found is due, that is, positively due, to an actual intercourse, if you know?

A. I can only give my impression.

Q. And whatever you say with respect to it then is an impression?

A. Based on the experience that I have had with married women in the office and those who are not married that come up for examination.

Mr. Ziegler: I think that is all.

Redirect Examination

Q. (By Mr. Munson): Doctor Stagg, I just want to ask you one thing. You have already testified to it, but, apparently, either the defense counsel didn't hear you or else he misunderstood [166] you. Did you say that, in the event of artificial stimulus or a stimulus of the area around the vagina

(Testimony of Doctor Lee Stagg.)

by other than, or by artificial means, would result in relaxation of the hymenal ring but would not cause this condition that you observed in the vaginal wall itself; in other words, masturbation wouldn't produce that effect?

A. That is the conclusion I would draw; but it is possible to stretch the hymenal ring and cause relaxation of that particular portion, according to the size of the object, all right, but other relaxation I have only seen in married women.

Q. That has been your experience as a doctor and your opinion as an expert, that that would be the effect?

A. Well, of course, I wouldn't qualify, try to qualify as an expert.

Q. We have just qualified you as an expert, Doctor.

A. I see. Well, that would be my experience.

Mr. Munson: Thank you.

Recross Examination

Q. (By Mr. Ziegler): And that would be your opinion?

A. Yes.

Q. Are you prepared to say definitely then, Doctor, that by the use of other objects other than from intercourse, [167] similar in size and other qualities, the same condition would result?

The Court: Well, he has already answered it a half a dozen times now. It is about time we got through.

(Testimony of Doctor Lee Stagg.)

Mr. Ziegler: Well, if the Court feels that he has answered it.

The Court: Why, certainly. He just got through answering the District Attorney for about the third or fourth time.

Mr. Ziegler: I don't recall what his answer was. That is my purpose in asking the question.

Mr. Munson: I object to any further questions along this line.

The Court: Well, I have already called attention to the fact that it is pure repetition now.

Mr. Ziegler: No further cross.

Mr. Munson: That is all, Doctor.

(Witness excused.)

Mr. Munson: The Government rests, your Honor.

The Court: Are you ready to go on with the defense?

Mr. Gilmore: Yes, we are, your Honor. Do you wish us to start now?

The Court: Have you a short witness?

Mr. Gilmore: No. We certainly couldn't get through by twelve. [168]

The Court: Well, perhaps you better start. I don't want to have this jury out over Thanksgiving Day, if it is possible to avoid it.

Defendant's Case

MRS. LYDIA PAWSEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please?

A. Mrs. Lydia Pawsey.

Q. Mrs. Pawsey, will you try to speak loud enough so the jurors even in the end chairs may hear you? Speak up. And where do you live?

A. I live with the Lindseys right now.

Q. Here in Ketchikan? A. Yes.

Q. And is Mr. and Mrs. Lindsey related to you, or are they? A. Mrs. Lindsey is my daughter.

Q. Now, how long have you lived here?

A. It must be over forty years. I lived over here since I got married.

Q. Over forty years. Now, you of course know Loretta Lindsey?

A. She is my granddaughter. [169]

Q. Do you know about how long she has been in the Lindsey home?

A. I don't remember how long. She was quite small though when she was adopted to the Lindseys.

Q. But you have known her ever since the Lindseys adopted her; is that correct? A. Yes.

Q. And of course you saw her frequently, did you?

(Testimony of Mrs. Lydia Pawsey.)

A. Yes, sir. We had dinners up to their place once in a while on holidays.

Q. And would she come to you and visit in your home too?

A. Sometimes she does; if she is sent for something, why, she would come down to the house.

Q. Now, calling your attention to April of this year, April, 1954, sometime shortly before Easter time, do you recall Loretta coming to your house that day? A. Yes.

Q. And do you recall that she made a complaint to you that day, or a conversation that she had with you that day?

Mr. Munson: I object, your Honor. This is eliciting hearsay testimony.

Mr. Gilmore: It isn't the subject matter of the conversation, your Honor. It is just the transaction and the event without a recitation.

The Court: Well, if it is just merely going to the [170] fact of whether or not there was a conversation, why, she may be asked about it, but the conversation itself over the objection could not be related.

Mr. Gilmore: No.

Q. (By Mr. Gilmore): We don't want what she told you but whether or not she came to your home and had a conversation with you that day.

A. It must be—I am not quite sure though—it must be after five o'clock. We were just getting through having our supper, and her mother called up before that to find out if she was down at the

(Testimony of Mrs. Lydia Pawsey.)

house, and I said, "No." I don't remember whether I answered myself.

Q. Don't say the words that were spoken. You are just telling us that she came there and did have a conversation? A. Yes.

Q. Now, following her coming to your home that day, what did you do, or what did you and Loretta do, and where did you go?

A. As soon as she come in the house, I told her, I said, "Your mother called." She said, "I am not going home." I said, "What is the trouble now?"

Mr. Munson: Well, that is eliciting hearsay again.

The Court: Over the objection——

Q. (By Mr. Gilmore): I asked you first what you did after she came to your home, and where did you go following that? [171]

A. Well, I will have to tell you what we said before we go some place, don't I? You can't just go.

Q. You can't repeat the conversation, the words that were spoken back and forth, Mrs. Pawsey, but you can tell the jury what you did after she came to you and had a conversation there. That is what I want you to tell the jury now, what you did after Loretta came there, as you have just testified.

A. I told her, I said——

The Court: But you are not allowed to say what you said or she said but only what you did. The question is, what did you do after that?

A. Well, I will have to talk to her before we go some place. You can't just leave.

(Testimony of Mrs. Lydia Pawsey.)

The Court: No. You can't tell here over objection what you talked about. You can just leave that out and tell your attorney what you did after that.

Q. (By Mr. Gilmore): That can be inferred, Mrs. Pawsey. The jury can assume that you had a talk if you tell us, after she came there and had the talk, then what you did and where you went.

A. We went up to her mother's place.

Q. All right. Now, did she make any kind of a report to you about her father?

A. That is why I was trying to tell you before. We are [172] going backwards now.

Q. Yes; but my question is a little different. I just want to know whether she made a report to you about her father without you saying what she said.

The Court: Do you see? You answer that question yes or no.

A. I told her, I said——

The Court: You can't tell what you told her or what she told you, but you can merely say whether she made a report or a complaint about her father. You can answer that yes or no. A. Yes.

Q. (By Mr. Gilmore): Had she told it to anybody else before this?

Mr. Munson: I object, your Honor, as calling for something this witness couldn't know.

The Court: Well, unless she knows, she wouldn't be able to answer it of course. If she knows, she may answer it.

(Testimony of Mrs. Lydia Pawsey.)

Q. (By Mr. Gilmore): But, if you know, had she ever told anybody about this before?

A. I asked her, and she said she told it to her girl friend and the Riewolds.

Q. But before that had she? That was that same day, was it not? A. That same evening. [173]

Q. But how about whether she had told it to anybody before that——

Mr. Munson: Your Honor, I object to the form of the question.

Q. (By Mr. Gilmore): ——if you know?

Mr. Munson: Well, I think he cured it—if you know. I think he should say—do you know whether——

The Court: Well, but she has answered the last question in a way that certainly plainly indicates she doesn't know, except from what Loretta told her, and that is not personal knowledge. In other words, you ask her if she knows, and she relates a conversation that she had that would be hearsay and not personal knowledge.

Mr. Gilmore: Well, I am not convinced, your Honor, that she——

The Court: For instance, if she heard Loretta tell somebody else, then she had personal knowledge, but, unless she did that, she has no personal knowledge.

Mr. Gilmore: Or unless she had personal knowledge——

Q. (By Mr. Gilmore): What I want to know is whether or not you have personal knowledge as

(Testimony of Mrs. Lydia Pawsey.)

to whether she ever told anybody about this before, that is, what she told you about what her father had done?

The Court: Every time you ask her that, then she starts in over the objection to relate what was said. [174]

Mr. Gilmore: Well, I know it, your Honor, and I am doing my very best, but there is a difficulty in eliciting, of course, abiding by the rules of evidence with this witness, and I think, if the Court will indulge it, we can relax just a little bit.

The Court: Well, the only reason I mentioned it is so that you would be careful how you bring your answer out or we get into this argument all the time.

Q. (By Mr. Gilmore): Well, yes, I know, and I will be as strict and careful as I know how.

Q. (By Mr. Gilmore): What I want to know is, do you know, prior to that day when she told you about this complaint about her father, had she ever before that day ever mentioned it or told it to you? A. No.

Mr. Munson: Does that mean that you don't know?

A. Well, not before that day she come down to the house.

Mr. Munson: I still don't know whether——

Mr. Gilmore: Well, I will make it clear.

Q. (By Mr. Gilmore): Now, counsel has raised the question as to whether you understood my ques-

(Testimony of Mrs. Lydia Pawsey.)

tion. Do you know whether she ever told anybody about this before that day? A. No.

Q. She never did?

Mr. Munson: No. She answered that she doesn't know [175] whether she ever did.

Q. (By Mr. Gilmore): Do you know whether she ever told anybody about this before that day; do you know?

A. Not until that evening she came down to the house.

Q. That is the first time she ever told about this, and you know that?

Mr. Munson: Your Honor, I don't wish to heckle the counsel here, but the witness has merely testified that she doesn't know whether a complaint was made or——

The Court: Well, that would be the way that you would ordinarily take it, but maybe she has difficulty with the English language. But what is wrong with the answer is this, that she said, she indicated by her answer that she knows nothing about what Loretta Lindsey might have said before to anybody else, and then she says that not before that night did she tell anybody, so that it is obvious that she couldn't know what Loretta Lindsey did before from her own answer.

Mr. Gilmore: Well, I thought that would be something the jury could conclude from because of her close association with Loretta over the years.

The Court: Yes; but, when you asked whether she knew whether Loretta ever made a complaint

(Testimony of Mrs. Lydia Pawsey.)

of that kind before, that assumes to somebody else.

Mr. Gilmore: I know, your Honor; but I didn't say, [176] did she make a complaint, whether she knew of her own personal knowledge, and of course it would be based on her close association with Loretta. See, that is what I am trying to get. Assuming that she knows, she would either know or she wouldn't know of her own knowledge whether she ever made any complaint before.

The Court: Yes; but, when she answers that Loretta Lindsey never made any complaint before, then the question arises, how does she know that? Was she with her every minute of the time?

Mr. Gilmore; No; but just because of her close association with Loretta.

The Court: You mean, because she didn't make it to her, why, she assumes that Loretta never made it to anybody else.

Mr. Gilmore: That could be one way she would know.

The Court: Well, so long as it is clear before the jury what she means.

Mr. Munson: Well, I presume now that what the question means is, did Loretta ever make a complaint before to this witness.

Mr. Gilmore: The witness has testified and said that she never made such a complaint before.

Mr. Munson: To her.

Mr. Gilmore: No; she didn't testify to that.

Mr. Munson: The Judge just ruled that she

(Testimony of Mrs. Lydia Pawsey.)

couldn't possibly have testified as to whether Loretta made complaints to anyone else or not.

The Court: The jury of course is entitled to have any difficulty of this kind clarified, and it is obvious of course without any argument that, unless she was with Loretta every minute of the day, all the time, she wouldn't know what Loretta might have told or didn't tell somebody else.

Q. (By Mr. Gilmore): All right, now, Mrs. Pawsey, where did you go from your house after Loretta came up there that day?

A. We went up to her mother's place.

Q. To Mrs. Lindsey's? A. Mrs. Lindsey's; yes.

Q. And you say that was about what time of the day, if you remember?

A. I don't know exactly the time. It must be after seven o'clock. I am not quite sure.

Q. And who was at the Lindsey home when you got there?

A. There was Bobby and the two boys that were staying with them and Mrs. Lindsey, and that was all that was there.

Whereupon Court recessed until 2:00 o'clock p.m., November 23, 1954, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the witness Mrs. Lydia Pawsey resumed the witness stand, and the Direct Examination by Mr. Gilmore was continued as follows:

Q. Mrs. Pawsey, I think you were telling the jury about who was present down at the Lindsey house, just before we concluded at noontime, so will

(Testimony of Mrs. Lydia Pawsey.)

you tell us that again? Who was present down at the Lindsey house when you went down there?

A. There was Bobby and the two boys that were staying at the Lindseys' and Loretta and Gary and Mrs. Lindsey.

Q. All right. Will you just go ahead and explain now what took place down there please?

A. That is the time when Loretta was telling her mother what happened, you know, between her and Lindsey.

Q. And she made a charge down there, the same thing that she told you, in substance, that her father had been bothering her?

A. The same story.

Q. Now, had her mother ever heard that story before, if you know?

A. No. That was the first time.

Q. And it came as a distinct shock and surprise to all concerned, to everybody there; is that right?

A. Yes.

Q. Now, where did Loretta stay following that day?

A. I took her home with me.

Q. And did she continue to stay with you at your house? [179]

A. Just a few days, until Miss Seliotes——

Q. Who is Miss Seliotes?

A. The Welfare worker.

Q. And what about her; what were you going to say?

A. I told 'Retta that afternoon to be sure and come right home after school because I am going to send you down to Jimmy's to get some grocer-

(Testimony of Mrs. Lydia Pawsey.)

ies, and she didn't come home, so I went and looked for her, and——

The Court: Just have her eliminate these details in answering the question.

Mr. Gilmore: Yes.

Q. (By Mrs. Gilmore): Mrs. Pawsey, why was it, just tell the jury, why was it that Loretta discontinued staying at your home with you, or why she did not come home from school, if you know?

A. I think it was the day she reported about it to the District Attorney.

Q. Well, was she told, or did you say that she was told by Miss Seliotes that she was not to come to your house?

A. I am not sure. I think she called up my other daughter, that she could stay with her that night until she could find a place for her the next day.

Mr. Munson: Your Honor, I object to any further going into this collateral issue.

The Court: I don't see how it has any relevancy.

Q. (By Mr. Gilmore): Now, Mrs. Pawsey, when is the next time that you saw Loretta after this time that you are testifying about?

A. On a Sunday afternoon.

Q. And when was that with reference to the time that she was staying with you at your home?

Mr. Munson: Objected to as immaterial, your Honor.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Well, now, I don't quite follow you, and I am sure the jury doesn't, as to

(Testimony of Mrs. Lydia Pawsey.)

when was the next time you saw Loretta following her not staying at your home any more.

Mr. Munson: Same objection, your Honor.

The Court: It will be permitted only as a preliminary question.

Mr. Gilmore: Yes; it is preliminary, your Honor.

Q. (By Mr. Gilmore): Do you remember the next time that you saw Loretta and, where it was?

A. Yes. It was in our house.

Q. And when was that with reference to the time that she wasn't staying with you any more?

A. I think that was the day that she reported about it to the District Attorney.

Q. Now, did Loretta leave Ketchikan sometime after that? A. She went to Wrangell. [181]

Q. Do you remember about the time she went to Wrangell?

A. No; I didn't know nothing about it.

Mr. Munson: Your Honor, I ask that that testimony that she just gave be stricken on the ground that it is hearsay, and she says she doesn't know when it was, and I doubt if she knows from her own personal knowledge where she went.

The Court: Well, she didn't give any hearsay testimony. She said she didn't know anything about it.

Q. (By Mr. Gilmore): But you do know that she went to Wrangell; is that correct?

A. Later on I found out that she was in Wrangell.

Q. Now, did you see her on her return from Wrangell? A. I did.

(Testimony of Mrs. Lydia Pawsey.)

Q. And when was that?

A. It was—I don't remember the date though—it was in the afternoon at the Lindsey home.

Q. Would that have been in August?

A. Somewhere around there.

Q. And you were at the Lindsey home?

A. Yes.

Q. What time of the day was it, if you recall?

A. In the afternoon.

Q. And who else was at the Lindsey home?

A. Mrs. Lindsey and Mr. Lindsey.

Q. And what took place when Loretta came to the Lindsey home [182] that day?

A. Well, she was telling me that she dropped the case. She said she dropped the case and that is why she come down here.

Q. And what else did she say?

Mr. Munson: I object, your Honor.

The Court: Objection sustained. There has been no foundation laid for any such conversation.

Q. (By Mr. Gilmore): Well, now, you testified that present were Mrs. Lindsey and Mr. Lindsey and yourself; is that correct?

A. Yes; that is the three of us.

Q. And Mr. Lindsey was there? A. Yes.

Mr. Gilmore: Now, your Honor, I think she is permitted or should be permitted——

The Court: I have pointed out to counsel here for weeks, not you necessarily, but a lot of others, that you cannot impeach a witness by asking a question of the impeaching witness that was never asked

(Testimony of Mrs. Lydia Pawsey.)
of the witness sought to be impeached. Now, that ought to be plain enough. So, the objection is sustained.

Q. (By Mr. Gilmore): Now, at that time—I will ask you this—when she said about her dropping the charges——

Mr. Munson: I object to his bringing out that [183] hearsay, your Honor.

The Court: Any conversation is included within the ruling of the Court.

Mr. Gilmore: Including a specific question, your Honor?

The Court: Yes, certainly, unless the question were asked of the witness Loretta Lindsey when she was on the stand.

Q (By Mr. Gilmore): Now, was there any conversation by Loretta concerning any charges in Wrangell?

Mr. Munson: I object. There was no impeachment foundation laid for that question, your Honor.

Mr. Gilmore: Well, there was testimony about it, your Honor, in Loretta's testimony.

The Court: I don't know how you can add to it by merely bringing out from this witness that such was stated. She herself has admitted it.

Mr. Gilmore: Except that there could be a variance, and it wouldn't have to be exactly the way the witness——

The Court: There would have to be a foundation laid for it if you want to show a variance.

Q. (By Mr. Gilmore): Now, did Loretta con-

(Testimony of Mrs. Lydia Pawsey.)

fess that she had lied in making the charge, the original charge, about her father?

Mr. Munson: I object to this for the same reason, your Honor. [184]

The Court: The same ruling.

Q. (By Mr. Gilmore): Mrs. Pawsey, at this same time and place, I will ask you whether or not Bob came in, was there or came in, and said that, yes, that could be, concerning the charges, because there is rubbers all over the rafters upstairs?

Mr. Munson: I object on the ground that no——

The Court: Objection sustained. There was no foundation laid for it.

Mr. Gilmore: Well, but it is preliminary, if the Court please.

The Court: Well, you better pick out something else that is preliminary and not something that is that material.

Q. (By Mr. Gilmore): Now, Mrs. Pawsey, did you or any other members of your family after that time, sometime later, make a search or an inspection of the upstairs rooms with a view of finding any evidence to support the charges that Loretta made against her dad?

A. I don't know.

Q. Did you inspect the upstairs?

A. I didn't. I didn't go upstairs at all.

Q. I see. Do you know whether or not Bob did?

A. I don't know if he did.

Q. I see. Did Pat, your son? A. Yes.

Q. And did you go with him? A. No.

(Testimony of Mrs. Lydia Pawsey.)

Q. But you know that Pat did make an inspection of the upstairs?

A. No, I don't know that because——

Mr. Munson: I move that her testimony on that be stricken, your Honor. She doesn't know.

The Court: Well, it is harmless if she doesn't know. There is no use of striking it.

Mr. Gilmore: Well, if the Court please, just like the difficulty we were having before lunchtime, I think that your Honor will agree with me that because of the difficulty of this witness in understanding some of my questions that you should grant a little indulgence, or at least I ask your indulgence in that regard. I state that now in view of the fact that I feel the witness is a little mixed up, and I would like leave of the Court to ask at the sake of repetition the same question again, just once again.

The Court: Well, I don't see how she could be mistaken about the question. She seems to have a pretty good command of English and she has answered your question. I think, about three times, but, if you think that she is mistaken, you may ask her the question again.

Mr. Gilmore: Thank you, your Honor.

Q. (By Mr. Gilmore): Now, Mrs. Pawsey, I will ask you [186] whether or not you know whether your son Pat made an inspection of the upstairs, of that room, with a view of finding evidence of the charges made against Rollie?

(Testimony of Mrs. Lydia Pawsey.)

Mr. Munson: I object to that question, your Honor.

Mr. Gilmore: If she knows.

Mr. Munson: I object on the ground that it would be immaterial if an inspection was made for evidence or not.

The Court: Well, has there been any testimony heretofore about an inspection of this kind? I don't remember it.

Mr. Gilmore: Well, there has been——

Mr. Ziegler: There has been none yet, your Honor.

Mr. Gilmore: None yet, but there will be. We make that offer to the Court now.

Mr. Munson: I object.

The Court: Well, then, it would seem immaterial whether an inspection was made, but it would be material if anything was found.

Mr. Munson: That is not the question, your Honor.

Mr. Ziegler: It is preliminary.

Mr. Munson: I also object that the counsel is trying to elicit testimony from this witness which should be testified to by someone else. In fact several of the questions have been objected to on the ground that this is not the proper witness.

The Court: Well, of course, one witness can state [187] matters within her knowledge that some later witness will testify. There is no legal objection to that.

Mr. Ziegler: I think—pardon me, Mr. Gilmore

(Testimony of Mrs. Lydia Pawsey.)

—I might have some doubt that she understands the word “inspection”, and I think, if the question were framed differently, she would know, and that is to this effect, your Honor—did she in company with any other person go up in that room and look to see whether there was any evidence there supporting this crime, this alleged crime. I think she would probably understand that question.

The Court: Well, that may be, but I am wondering what the foundation is for this question. For instance, has anybody testified that there was a search of this kind made or that there was anything up there?

Mr. Gilmore: Well——

The Court: For instance, it is like asking her—did you go down to such and such a grocery; she might have gone down there; so what?

Mr. Gilmore: Well, before we could ask her her findings, your Honor—I know what your Honor is getting at—I would ask her that, and this is preliminary to the results of her findings, and I am certain that she is mistaken in not being able to recall that she did go up and look around in the room for evidence in support of the charge made against Rollie. [188]

Q. (By Mr. Gilmore): Now, Mrs. Pawsey, I ask you whether or not you remember if you went upstairs in the Lindsey home with Pat, your son Pat, or anyone else and looked around upstairs——

Mr. Ziegler: With a flashlight.

Q. (By Mr. Gilmore): ——with flashlights or

(Testimony of Mrs. Lydia Pawsey.)

with lights on or anything, looked around upstairs for evidence in support of the charge that Loretta made against Rollie?

A. I think Bobby did. They told me that, and the two boys. They were looking up there, but I didn't go upstairs that same evening.

Mr. Munson: Your Honor, I move that that be stricken as hearsay.

The Court: Well, it is harmless, so there is no necessity for striking it.

Q. (By Mr. Gilmore): Are you aware or do you know whether or not Mr. Lindsey and Mrs. Lindsey have had considerable difficulty in raising Loretta?

Mr. Munson: I object to that as immaterial, your Honor.

The Court: Objection sustained.

Mr. Gilmore: You may take the witness. [189]

Cross Examination

Q. (By Mr. Munson): Mrs. Pawsey, do you recall what day it was that Loretta told you about what Mr. Lindsey was doing to her?

A. I know it was sometime before Easter, a few days before Easter.

Q. A few days before Easter?

A. But I don't know the exact date though.

Q. Was it that same day that you took Loretta down to your house to live with you?

A. Yes; that same evening.

(Testimony of Mrs. Lydia Pawsey.)

Q. The evening of that same day you took her to live with you? A. Yes.

Q. Did you hear earlier today, did you hear Bob, Robert Lindsey, testify that you and he went up to Loretta's room and in her closet and found these cotton balls?

A. No; I didn't go up that evening.

Q. No. Did you go up with Bob?

A. No, I didn't. He went up with Gary, I think, and the two boys. There is four of them went up there. That is when he brought that little can down. I don't know what it is all about.

Q. A little "Trojan" can?

A. A little square can. And he put it right alongside of [190] Mrs. Lindsey, and that is the evidence, he said.

Q. That was the evidence?

A. That is what he said.

Q. Did you look in that can?

A. I didn't.

Q. You didn't pay any attention to it?

A. No.

Q. Did you hear Bob say that it was a "Trojan" can, an empty "Trojan" can?

A. I don't even remember what the name of the can was.

Q. Did you know what it was for?

A. No.

Q. You didn't pay much attention to it?

A. No.

Q. Well, Mrs. Pawsey, when Loretta first told

(Testimony of Mrs. Lydia Pawsey.)

you about these charges that were made or about these acts that Rolland Lindsey had done to her, did you tell her to "Keep quite about it and don't get the family in trouble"?

A. I didn't say it that way. If you want me to repeat what I said, I will do it.

Q. Fine.

A. Well, I told Loretta, "Loretta", I said—Rollie was out at that time, and I couldn't make it out why Rollie was doing this to her, because Rollie was out. He was out logging. So I asked her, "When did this happen?" And [191] she said when she was a little girl. It had been going on for a long time, she said. I said, "Why didn't you tell somebody? Why didn't you tell your mother about it?" "Because I know nobody would believe me," she said. So, "You take your father up there," I said, "and we will try to straighten it out between ourselves. Maybe we call Father Hodgkins," I said.

Q. You didn't want to bring this disgrace on your family, did you?

A. No. "We will try to straighten it ourselves. If we can't do it, then take it to court," I said.

Q. I see. And of course that same day you brought her to your house to stay with you?

A. Yes.

Q. Were you there in the Lindsey house when Loretta and Victoria were there, and Rollie was there, and you were there, and you were talking about this case, and Loretta mentioned that she had been examined by a physician and the physi-

(Testimony of Mrs. Lydia Pawsey.)

cian knew that she wasn't a virgin, that she had had intercourse?

A. I didn't hear about that. I didn't even know that she went to the doctor.

Q. You didn't know that? A. No.

Q. You didn't hear her mention that? [192]

A. No. I didn't hear it until today.

Q. Today was the first time you knew about the medical examination?

A. About the doctor.

Q. Well, did you hear Rollie tell Loretta that, if she were asked about it, to tell them that she stuck a banana up her? A. No.

Q. You don't recall that?

A. No. I wasn't there.

Q. Mrs. Pawsey, after you had your talk with Loretta, and you wanted to prevent this case from getting into court, and all this——

A. Yes; because I told her, "It is a dirty case," I said, "Loretta, when you get on the stand, you are going to drink your tears," I said, "so, just wait," I said.

Q. Why did you take her out of the Lindsey home that day?

A. To take her home with me that day, because she was planning to go south. I said, "Where do you think you are going?" She said, "I am going south," she said. I said, "I have got something to say about this, 'Retta,'" I said, "I am your grandmother; so you are going to stay with us."

(Testimony of Mrs. Lydia Pawsey.)

Q. And you took her away from the Lindsey home?

A. That is why I took her home. I said, "You are not going south," because the one she calls "Mother" down south is [193] no relative of hers at all; just adopted.

Q. Adopted mother? A. Yes.

Q. So you took her to your house to protect her; is that it? A. So she won't go south.

Q. So she won't run away, won't leave?

A. Not to run away, but I don't want her to go south.

Q. You didn't want her to go with those people?

A. No, because——

Q. You didn't want her to stay with Rollie?

A. "If she was your real mother," I said, "I would help you," I said, "to go to her. She is no relative of yours."

Q. So you took her into your home?

A. So I took her home.

Q. Well, you feel pretty strongly about your family, don't you?

A. Yes, I do. I love every one of them.

Q. And you want to see your family kept together? A. I do.

Q. And that is why you didn't want Loretta to go down below? A. Yes.

Q. And you wanted to keep her here?

A. Yes.

Q. And you wanted her to just forget about these things that happened to her for the sake of

(Testimony of Mrs. Lydia Pawsey.)

the family; is that the [194] way you felt about it?

A. Yes.

Q. And you felt that way right along?

A. Yes.

Q. That it was better for Loretta to just more or less forget about it and not bring it to court and keep the family name intact, pure; is that right?

A. I told her, "It is a dirty case, Loretta. It is not nice," I said, "to be out in front of the people." I said, "to be on the witness stand."

Redirect Examination

Q. (By Mr. Gilmore): Well, now, Mrs. Pawsey, when you said inasmuch as Loretta made the charge when Rollie was out of town, out logging, didn't you say, "Let's wait until Rollie comes in and see if we can get this straightened out"? Isn't that what you said? A. I did.

Mr. Munson: I object to that as leading, your Honor.

The Court: Yes; it is leading, but it has been answered.

Q. (By Mr. Gilmore): Now, you wanted just to get at the bottom of this, didn't you?

Mr. Munson: I object as leading, your Honor.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Well, what was your purpose, you tell the jury, why you wanted to wait until Rollie came in and find out about this?

A. To find out if it is the truth or not the truth.

(Testimony of Mrs. Lydia Pawsey.)

Q. All right. That is all you wanted to do, wasn't it?

A. That is right. I wanted to find out; yes.

Q. Did you have an idea that maybe Loretta was lying about this charge?

A. It is hard to say that.

Q. Yes.

A. That is why I wanted to straighten it out and find out the truth or if it is not the truth.

Q. That is all you had in mind?

A. That is all.

Q. And you weren't trying or didn't want to suppress the charges and not bring them into court?

Mr. Munson: I object as leading, your Honor.

The Court: Objection sustained. She is your witness. You can't lead her that way.

Mr. Gilmore: Well, I thought there was a rule that permitted a difficult witness to be led, your Honor.

The Court: She is not difficult. She hasn't shown the slightest inclination to be reluctant.

Q. (By Mr. Gilmore): Now, Mrs. Pawsey, you testified that [196] when you went over to the house and Loretta made the charge against her father, against Rollie, that he went upstairs and came down with something?

A. Who—Rollie?

Q. No. Bob.

A. Oh. I don't know. Oh, that little can?

Q. Yes. A. Yes.

Q. And who was present then when he came down with that little can?

(Testimony of Mrs. Lydia Pawsey.)

A. It was Gary and Robert and Loretta, but the two boys were in the kitchen.

Q. Was Mrs. Lindsey present?

A. Well, he put that little can right alongside Mrs. Lindsey on the armchair.

Q. And you were right there?

A. I was right there.

Q. And what did he say when he put that can down?

Mr. Munson: I object, your Honor.

A. "This is the evidence," or something like that.

The Court: On the ground that it is hearsay? I think it has already been testified to anyway.

Q. (By Mr. Gilmore): Now, is that the little can that Bob put down and said, "Here is the evidence"? A. Something like that. [197]

Q. Similar to that?

A. I didn't look close enough at that. I was crying too much, so I didn't look at the can so much.

Q. And you don't know where Bob got this, do you? A. No, I don't.

Q. But he went upstairs, where his room is, before he produced it?

A. Yes; they went upstairs first and brought that down and showed Victoria the evidence.

Q. Was this the only thing that he came downstairs with? A. That is all.

Q. And he put that down on the chair alongside of his mother——

The Court: Well, now, you have gone over that

(Testimony of Mrs. Lydia Pawsey.)

about three times. I am trying to make some progress in this case.

Mr. O'Connor: May we see the can? Is this supposed to be the same one he brought down?

Mr. Gilmore: The same or similar.

Mr. Ziegler: As I understand it, that is the can that was brought down; yes.

Mr. Gilmore: We are not offering it as an exhibit at this time. We have another witness that will do that.

Q. (By Mr. Gilmore): Did he open it, or did he display it, or——

A. No; he didn't open it. [198]

Mr. Gilmore: No further questions.

Mr. Munson: No further questions.

The Court: That is all, Mrs. Pawsey.

(Witness excused.)

PAT PAWSEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Pat Pawsey.

Q. You live here in Ketchikan, do you?

A. Yes.

Q. And that was your mother that just testified on the stand, was it? A. Yes.

(Testimony of Pat Pawsey.)

Q. You were born here in Ketchikan?

A. Yes.

Q. Are you related to the defendant in this case, Rollie Lindsey? A. Pardon?

Q. Are you related to the defendant, Rollie Lindsey? A. Brother-in-law.

Q. Brother-in-law. Mrs. Lindsey is your sister?

A. Yes. [199]

Q. And you are likewise related to Mrs. Dalton, Florence Dalton, who testified in this case?

A. My sister.

Q. And of course you know Loretta?

A. Yes.

Q. And of course she is related to you, is she?

A. Yes.

Q. Now, Pat, calling your attention to sometime in the spring of this year, 1954, I will ask you to tell the jury whether or not Loretta Lindsey came over to your home—you live with your mother, do you not? A. Yes.

Q. Do you remember whether Loretta came to your home? The Pawsey home?

A. Yes, she did.

Q. Do you remember about when it was?

A. Pretty close to Easter, I believe.

Q. All right. And what did she report that day when she came to your home, as you recall it?

A. She told Mom and I, that Rollie tried to rape her three times, when she came in the house.

Q. She said that Rollie had tried to rape her three times? A. Yes.

(Testimony of Pat Pawsey.)

Q. Did she make any kind of a charge?

The Court: He has already answered that. Was this [200] question ever asked of Loretta Lindsey? If not, the whole thing is stricken and the jury instructed to disregard it. There has got to be a foundation laid before you attempt to impeach a witness that has testified and left the stand.

Q. (By Mr. Gilmore): Now, Pat, sometime following that did you go to the Lindsey home?

A. I went up there with my mother.

Q. All right. And when you went there did you make a search of the upstairs part of that room, of that house, for evidence in support of the charges made against Rollie?

A. Yes. My mother and I both went up.

Mr. Munson: I object, your Honor. They are impeaching their own witness now. The grandmother said——

Mr. Gilmore: Oh, no, we are not. I sincerely submitted to the Court that I thought——

The Court: Why don't you give the Court a chance to rule. There is no bar against developing inconsistencies between the witnesses' testimony.

Mr. Gilmore: No.

Q. (By Mr. Gilmore): What did you go upstairs to search for, Pat?

A. There is supposed to have been rubbers up there or something like that.

Q. And did you go up and make a search of the upstairs? A. Yes, we did. [201]

Q. In Loretta's room? A. Yes.

(Testimony of Pat Pawsey.)

Q. Her bedroom is upstairs? A. Yes.

Q. Did you find any rubbers up there, Pat?

A. I didn't find anything like that.

Q. Did you make a thorough search?

A. Yes, we did.

Q. Are there lights up there? A. Yes.

Q. The house is wired for lighting upstairs?

A. Yes, it is.

Q. Did you use anything else to illuminate the upstairs?

A. Well, in the closets there we used a flashlight.

Q. So you made a thorough search, Pat?

A. Yes.

Q. And your Mom was with you, you testified?

A. Yes.

Q. Although you just heard her testify that, undoubtedly, she didn't remember; is that right?

Mr. Ziegler: He wasn't in the courtroom.

A. I was outside.

Q. (By Mr. Gilmore): I see. Did you search the rafters too? A. Yes, I did.

Q. And the closet? [202] A. Yes.

Q. Why did you pay particular attention to and search the rafters upstairs?

A. Well, I searched any place where there could have been anything like that. They were open.

Q. And of course, Pat, you had heard that there was evidence upstairs? A. Yes.

Q. Had you not, before this search?

A. Yes.

(Testimony of Pat Pawsey.)

Q. Now, you have been well acquainted with Loretta, I suppose, through your family relationship and you know her pretty well, do you?

A. Yes.

Q. What is her reputation——

Mr. Munson: I object, your Honor. There is no foundation been laid for this.

Mr. Ziegler: You don't know what the question is yet, Mr. Munson.

Mr. Munson: Her reputation.

The Court: Well, I don't know what the reputation is going to be for.

Mr. Gilmore: For truth and veracity.

The Court: Objection is overruled.

Q. (By Mr. Gilmore): Pat, do you know the reputation of [203] Loretta in your family and in the community here for truth and veracity?

A. Not in the community.

Q. You do amongst your family?

A. Amongst the family; yes.

Q. Well, is that reputation——

Mr. Munson: I object, your Honor.

The Court: Objection sustained. It is not what it is in the family.

Mr. Gilmore: Your witness.

Mr. Munson: No cross examination.

The Court: That is all.

(Witness excused.)

ROBERT H. ZIEGLER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Robert H. Ziegler.

Q. And your business, profession or occupation?

A. Attorney.

Q. And you are a member of what firm?

A. Ziegler, Ziegler & Cloudy.

Q. And I will ask you whether or not you know whether your [204] firm or whether your father represented Mr. Rollie Lindsey, who is on trial here today, last August, last summer?

A. Yes, sir, he did.

Q. Calling your attention, Mr. Ziegler, to the 25th day of August, 1954, do you remember that day? A. I do.

Q. And do you remember whether or not you saw Loretta Lindsey that day?

A. Yes, Mr. Gilmore.

Q. Tell the Court and jury please whether or not your father was in Ketchikan that day?

A. I don't remember whether he was in Ketchikan or not that day. I don't believe he was. I know he wasn't in the office that day.

Q. Now, where did you see Loretta Lindsey that day? A. At my office.

Q. And, by the way, you testified as to your profession and your association. Are you also a notary public?

(Testimony of Robert H. Ziegler.)

A. Yes, I am, Mr. Gilmore.

Q. Now, I will ask you whether or not you took a statement from Loretta Lindsey that day in your law offices? A. Yes, sir.

Q. And tell us who was present when she made this statement.

A. Well, Loretta was there; I was there; Mrs. Joe Francis, [205] who is our stenographer, was there; and Mr. Lindsey was there.

Q. Now, was it a free and voluntary statement on Loretta's part? A. Absolutely.

Q. Now, will you describe to the jury the manner in which the statement was made by Loretta—by that I mean whether or not it was in question and answer or narrative form—in your own words, if you will?

A. Yes, sir. Mr. Lindsey and Loretta appeared in my office the morning of the 25th of August, and they acquainted me then with the fact that she wanted to let us know, as her dad's attorneys, that she had not been telling the truth when she had filed this complaint before against her father, and, when I realized the seriousness of what she was about to say, I summoned our secretary in with her notebook, and then in question and answer form we reduced our conversation to writing, and after we had all the information taken down Loretta and her father left. I would say that took about forty-five minutes, as a minimum; maybe longer than that; but we finished in the morning. And then late that afternoon, as I recollect, she and her father

(Testimony of Robert H. Ziegler.)

came back, and I had her read the affidavit which had been typed, or the statement, very carefully. Prior to that I had explained to her [206] fully what perjury meant and so on and so forth. She read the statement, and then I swore her in, and her hands were upraised, and I said in words to this effect, "Do you swear that the contents of the affidavit or statement you are about to sign are the truth, the whole truth and nothing but the truth?" And she said, "I do," and she signed, and I notarized her signature.

Q. Bob, who asked the questions that were put in her affidavit?

A. I asked the questions, Mr. Gilmore.

Q. And who gave the answers?

A. The Lindsey girl.

Q. Now, on some of the questions was there a discussion before the answer was finally put down in writing, and, if so, would you tell the jury about that?

A. Yes, sir. Well, approximately, on four to six of the questions there would be some discussion before the answer would be given in final form. I would say that I joined in those conversations too. Mind you, this happened three months ago, and I can't be too certain as to what the questions were or those that we talked about. I am quite sure that we had quite an extensive discussion as to perjury.

The Court: Well, now, right there. You mentioned perjury. Don't you know that that wouldn't constitute perjury? [207]

(Testimony of Robert H. Ziegler.)

A. Well, it is my understanding, your Honor, if she was going to under oath make a statement under oath——

The Court: No statement before a notary public is perjury. It has got to be in a proceeding where the oath is required or authorized by law.

A. Well, no; then I was incorrect then, and I am incorrect now, your Honor. I thought as long as she was sworn——

The Court: No. You can't predicate perjury prosecutions on a false affidavit made in connection with such a proceeding.

A. Well, I so advised her at that time, your Honor.

Q. (By Mr. Gilmore): Now, Bob, did Rollie Lindsey suggest any of the answers to the questions?

A. No. The statements, the answers, as reduced to written form are the statements made by her. There may have been discussion on some of those questions before they went down, but I am positive in my own mind that the answers were given by her.

Q. Was there any attempt at any time by Rollie Lindsey to influence in any way Loretta in the answers that she gave?

A. No. As a matter of fact, I think once or twice she may have asked him about a date or a name or when she came back from Wrangell or something to that effect. As I say, I can't remember with particularity; but there was [208] no coercion used upon her, no duress.

(Testimony of Robert H. Ziegler.)

Q. And the discussion that you referred to, which was preliminary to the final wording which Loretta offered, related to maybe four to six questions of the entire statement?

A. Mr. Gilmore, I can't say with particularity. As I recollect, there wasn't too much conversation, but there was some.

Q. Now, it was in the afternoon when Loretta came back?

A. Some three or four hours later, as I recollect.

Q. Her father came back with her?

A. That is correct.

Q. And after you swore her—she read it before you swore her?

A. Absolutely.

Q. What did you say to her about reading it?

A. I told her to read it, as I recollect, carefully and slowly.

Q. And did she appear to do that?

A. She did appear to do that; yes, sir.

Q. She then signed the statement?

A. That is correct.

Q. And you administered the oath to her?

A. That is right.

Mr. Gilmore: I intend to offer this as an exhibit in the case. Do you want to look at it? (Handing document [209] to Mr. Munson.)

Mr. Munson: Are you offering it on the basis of his testimony?

Mr. Gilmore: Yes.

Mr. Munson: Well, I object to it, your Honor, on the ground that in the first place that it is not

(Testimony of Robert H. Ziegler.)

the best evidence of what took place at that interview, for the reasons already assigned yesterday, and for the further reason that it still does not represent, by this witness' own statements, what happened at that interview, in that there were discussions, I presume, between Loretta and Rollie Lindsey, since he said he just entered some of the discussions, and I doubt if the secretary entered into any, and also for the further reason that at the time this affidavit was made this girl was under a grand jury subpoena and was a complaining witness in a case, and that she was brought to this office by the defendant in this case without any knowledge on the part of me or anyone in my office and without anyone from my office being present at this interview, and that in my opinion it constitutes poor evidence of what took place and the circumstances of what took place in that office on that date, August 25, 1954.

The Court: Well, of course a good many of those objections are obviated by the fact that it bears her signature, but I am rather in doubt about its admissibility, due [210] to the fact that the girl was only at the time fourteen years of age and was taken by her foster father to the office of an attorney, and it seems to me that the influence that the father exuded over her would be presumed. I am just wondering whether it is admissible under the circumstances developed by this case.

Mr. Gilmore: Well, your Honor, we will if we haven't already convinced your Honor, I am sure,

(Testimony of Robert H. Ziegler.)

beyond any doubt, that there was no influence or coercion used in connection with this statement.

The Court: I am not saying that there was actual coercion or anything, but the circumstances were such that it would imply coercion, the relationship of the father to a fourteen-year-old girl.

Mr. Gilmore: Your Honor has in mind the letters that she wrote before she left Wrangell?

The Court: No, I don't have those in mind, because there was nobody there exerting any influence on her, as I understand it.

Mr. Gilmore: No; but, I mean, it is preliminary to her coming down and doing this. She wrote that she was coming down to do the very thing that she did, your Honor.

The Court: Well, if she did that, not in somebody else's office with her father present and, according to her testimony, suggesting to her the answers to make, why, then I would say the two would be on a par. [211]

Mr. Gilmore: Let's question him up and down to see if she did. I tried to be very careful——

The Court: You have; but I am speaking not now of his testimony but of her testimony that the defendant suggested at least some of the answers so that there is——

Mr. Gilmore: You mean prior to their getting to the law office, you mean, maybe?

The Court: Well, I think her testimony was limited to what occurred at the law office, but I think that there is a serious enough question of the ad-

(Testimony of Robert H. Ziegler.)

missibility of this to warrant my reserving a ruling on it until a later time, and counsel can submit what authorities they have.

Mr. Munson: Well, your Honor, I would like to urge another ground of objection, and that is that the only basis upon which this statement could be introduced would be to show a prior inconsistent statement, and the complaining witness on the stand admitted the circumstances surrounding the interview, and we now have another witness on the stand for the defense who can testify to the same matters. I submit again that it is hearsay and could be introduced only to show a prior inconsistent statement, and there has not been a prior inconsistent statement in the testimony, in evidence, by the complaining witness, and also I urge again that it is not the best evidence of what happened that day.

Mr. Ziegler: If the Court please, I would just like [212] to add this, if you will permit me. I think everything that has been said by the District Attorney here goes not to the admissibility of the statement but to the weight of it. These things can be argued as to the weight and effect of the statement, but, as to the admissibility of a statement that was signed before a notary public, I think it is absolutely admissible. These matters go purely to the weight and effect of it, not to its admissibility.

Mr. Munson: Well, your Honor, swearing before a notary public doesn't work any magic with legal papers, and this paper is no more admissible than if it had not been sworn to.

(Testimony of Robert H. Ziegler.)

The Court: Well, it isn't the sworn character of it so much as it is her signature on it, and, of course, when you speak of her signature, then we are confronted with the question of whether the circumstances were such that they constituted coercion or undue influence.

Mr. Ziegler: That would be a matter entirely for the jury, your Honor. I don't see how that can be passed upon.

The Court: It may very well ultimately be, but in the meantime I said I would reserve ruling and counsel can submit what authorities they have.

Mr. Ziegler: Pardon me. If the Court please, I think in this stage of the trial we should be advised as soon [213] as we can whether the Court is going to admit this in evidence because it comes at this time of the trial when it is necessary either to have it in evidence or know it is not going to be introduced in evidence.

The Court: How will it affect you if the ruling is reserved?

Mr. Ziegler: Well it may affect us in many ways.

The Court: But, name them.

Mr. Ziegler: Well, I can't name any specific ways because I can't tell what is going to develop.

The Court: Well, when it develops, you can call the Court's attention to it, but in the meantime there is nothing so unusual about the Court taking a question of this kind under advisement for the purpose of later ruling.

Mr. Gilmore: Well, your Honor, the next wit-

(Testimony of Robert H. Ziegler.)

ness that we will call will be Mrs. Lindsey, and she, your Honor, will testify to the circumstances relating to Loretta coming to their home after writing the letters advising that she was coming for the purpose of doing what was done and said in that statement and——

The Court: That may be, but she wasn't present at the office.

Mr. Gilmore: No; but then we have Mr. Ziegler and Mrs. Francis, the secretary, and at home we have the wife, so we don't know where—see, in the first place there is no [214] evidence of duress, and in the second place we have combatted every possibility that there was any.

The Court: Well, I don't get what you are driving at now. For instance, this ruling of mine doesn't preclude you from calling Mrs. Lindsey or anybody else.

Mr. Gilmore: No; I realize that; but, I mean, I am pointing out in advance now that it will show, I am sure, clearly to your Honor that she came forth voluntarily to make this statement.

Mr. Munson: She has already admitted that, your Honor.

The Court: It isn't so much—my ruling doesn't for a moment imply that there was any actual coercion or any psychological pressure or anything of the kind. My ruling involves the question of whether or not the circumstances and the relationship of these people were not such as to imply undue influence and coercion without anything having

(Testimony of Robert H. Ziegler.)

been said, but of course there is testimony here of the complaining witness that answers were suggested to her by the defendant.

Mr. Ziegler: That still goes, as I pointed out to the Court, to the weight.

The Court: I understand your position, but that doesn't solve the question as I see it.

Mr. Ziegler: Well, the Government's position then is that any time a sworn affidavit is produced in court, if [215] the person who signs it repudiates it or in any way indicates that it is not her affidavit, then it becomes inadmissible.

The Court: Oh, that is not stating the situation here. The crucial thing here is the relationship between the parties and the undue influence that one had within his power to exercise over the other. That is the crucial question. You may call your next witness, or is there cross examination?

Mr. Gilmore: You may be excused. Excuse me. Is there any cross examination?

Mr. Munson: Yes.

Cross Examination

Q. (By Mr. Munson): Bob, you said this took place a couple of months ago and all of the details aren't fresh in your mind; is that correct?

A. That is correct. Just about three months ago Thanksgiving.

Q. In other words, when you said that to your knowledge Mr. Lindsey didn't suggest any of the

(Testimony of Robert H. Ziegler.)

answers to Loretta in these discussions, you can't be absolutely sure of that?

A. Well, I can in this respect, Mr. Munson. I know that this was a serious matter, and I knew that I took my time with this, and I am quite sure that then, as now, I wouldn't have permitted him to have told her what to say [216] in an affidavit that I was preparing.

Q. But you did permit him to be there when this examination was going on?

A. He was present, certainly, but they both walked in together and——

Q. Did you know she was under subpoena at that time? A. I am not sure, Mr. Munson.

Q. Did you know he was the defendant in the case?

A. I knew he was the defendant, absolutely.

Q. And that she was the complaining witness?

A. I knew she was.

Q. And you didn't notify me about this interview?

A. As I recollect, there were no District Attorneys in town at that time, and I thought in view of the seriousness of what she was evidently prepared to tell me that I had every justification in the world for going ahead and reducing that statement to writing, which I did, and——

Q. And as quickly as possible before she changed her mind; is that it?

A. No. No. I immediately sent you a copy of

(Testimony of Robert H. Ziegler.)

that affidavit, if I am not mistaken; by "immediately," the next day or so.

Q. We had a secretary downstairs, did we not, in the office? A. I presume so; yes.

Q. She could have been there, couldn't she?

A. If I had thought about it; certainly; but I didn't think [217] about it, however.

Q. Now, you say that, when Loretta came to the office, she came with Mr. Lindsey?

A. I believe so; yes.

Q. In the morning? A. In the morning.

Q. And, when she came back in the afternoon to sign the affidavit, he was with her again?

A. That is correct.

Q. Didn't anything about this interview strike you as being unusual?

A. No. No. Can I tell you why? Because, as I told you, in the letter I wrote you, Mr. Munson, one of the things——

Q. Well, I don't want you to introduce any of that.

A. Well, then I can't answer your question without embarrassing you.

Q. Now, you said Loretta came back in the afternoon and she was accompanied by Mr. Lindsey? A. As I recollect; yes.

Q. And you handed her this affidavit and said, "Read it". Did she read it out loud?

A. She sat down in a chair across from me and my desk, and I said, "Take your time with this. Read it carefully and slowly," and I believe that—

(Testimony of Robert H. Ziegler.)

I don't know, Ted, but I think that Rollie and I discussed other matters while she [218] was sitting there in the chair and reading it.

Q. Like this case?

A. Could be. Could be the fishing season; could be anything. I don't know.

Q. Did she read it out loud? A. No.

Q. And then, as far as you know, you don't know whether she read it at all?

A. Well, I know she was told to. I know she had it in front of her for several minutes.

Q. And then you put her under oath?

A. That is correct.

Q. And at the time you put her under oath you realized that it had little or no significance except that you identified her as the person who signed that statement?

A. At the time I put her under oath I treated it very seriously indeed and of great significance because——

Q. As a lawyer, you know that you don't have any power to put her under oath?

A. As a notary public, I thought you did—subscribed and sworn to before me this certain day, you know.

Q. And you thought that that would make the document more legal, more proper?

A. Perhaps more impressive to her.

Q. But you don't remember the details of that interview [219] clearly. In other words, while you were sitting there——

(Testimony of Robert H. Ziegler.)

A. Oh, I couldn't now, except in general terms of what we talked about, without having the affidavit before me to refresh my memory.

Q. What I mean is, as you look back on that interview, you weren't paying too much attention to really all that was going on. You just wanted to ask her some questions and get some answers, and you noticed that she and the defendant were talking?

A. Infrequently, Mr. Munson; not the whole time.

Q. Well, I am not asking you how often, but that they talking and that the secretary wasn't taking that down, or did she take it down?

A. I don't believe she did. I don't believe she took everything down.

Q. I mean, she might have taken all of it down and then just transcribed the colloquy between you and Loretta; is that correct?

A. I don't know. I know this, that the questions that I asked, I presumed and still presume, were verbatim, and I have no reason to assume that the answers, as given, were anything else but verbatim also.

Q. Now, were these questions—did you just think of them yourself, or did you get help from Mr. Lindsey in framing your questions? [220]

A. I thought of them myself—I knew the background—as far as I can recollect, all of them; yes. I knew the background of the charges in the case.

Q. Bob, I want you to think hard now——

(Testimony of Robert H. Ziegler.)

A. As hard as I can.

Q. —as hard as you can, back to that day. Did Loretta ever say to you or in your presence so that you could hear, “I wonder what Mr. Munson will think of all this”?

A. She could have; she could not have; I don’t know.

Q. “I wonder what Mr. Munson will say when he finds out about this”?

A. I don’t remember. She could have said it. I don’t deny that she did; I don’t admit that she did. I do not know.

Mr. Munson: That is all the cross examination.

Redirect Examination

Q. (By Mr. Gilmore): Bob, did you tell Rollie to come back, and Loretta, and sign the statement so that they could go down and take a copy down to the United States Marshal’s Office as soon as it was prepared?

A. I believe Rollie did say he wanted—now that you mention it—I believe he did say he wanted to take it right down to the Marshal’s Office and show Fred Bryant.

Q. No representative of the D.A.’s Office in Ketchikan was [221] here?

A. There were no District Attorneys here, as I recollect.

Q. Now, about the method of reducing the answers to the questions that were put by you to Lor-

(Testimony of Robert H. Ziegler.)

etta, it followed the usual form that you do on any occasion——

Mr. Munson: I object to that as leading, your Honor.

Q. ——when you reduce a statement; isn't that right? A. That is right. It was——

The Court: The objection is sustained on the ground that it isn't what is done at other times; it is what was done this time.

A. Well, it was a simple question and answer interview.

Mr. Gilmore: No further redirect.

Recross Examination

Q. (By Mr. Munson): I would like to clear up something on recross. I just want to clear up one thing. A. All right; if I can.

Q. The fact that there were no D.A.'s in Ketchikan——

A. I said that is my recollection now. I don't think there were, or I feel sure that I would have notified them. I could be wrong about that, but I don't think that I am, Mr. Munson.

Q. Oh, I am not disputing you on that. I just wondered—it [222] has been quite sometime that there hasn't been a regular Assistant United States Attorney down here, hasn't it? A. Yes.

Q. And in situations of that kind, when you feel that something important has come up and that the United States Attorney or an Assistant should be notified, what do you do?

(Testimony of Robert H. Ziegler.)

Mr. Gilmore: I object, if the Court please. The question is related to this time.

The Court: Well, but the question is open here as to the propriety of taking such a statement. The Court hasn't ruled finally on its admissibility, so the good faith of the person taking it can be gone into.

A. I answered that question before, Mr. Munson in this way——

Q. I didn't hear you.

A. I thought that what she told me she was about to say was of such gravity and such importance and seriousness that I would be justified to promote the ends of justice by taking her statement.

Q. Well, what I meant is, when you encounter another important situation like that that concerns my office and I am up in Juneau, what do you do?

A. Let me put it this way——

Q. No. Just answer me now. What do you do normally when you want to get in touch with a United States Attorney [223] or an assistant?

A. We phone or we wire or we write.

Q. But you didn't phone or wire that day, did you?

A. No, I did not.

Mr. Munson: That is all.

A. Any more questions, Mr. Gilmore?

Mr. Gilmore: No further questions. Thank you very much.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as

heretofore and the jury all present in the box; and the trial proceeded as follows:

VICTORIA LINDSEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Victoria Lindsey.

Q. And you are the wife of the defendant, Mr. Rollie Lindsey? A. I am.

Q. And where do you live?

A. 1067 Woodland Avenue.

Q. How long have you lived in Ketchikan?

A. Practically all my life. [224]

Q. And your occupation?

A. Housewife.

Q. And you have children, do you?

A. Three.

Q. And adopted children?

A. Robert and Loretta.

Q. And what are the ages of your own children?

A. Three, two, and approximately nine months.

Q. And when did you and your husband adopt Bob and Loretta?

A. About eight years ago.

Q. In about 1946 or '47?

The Court: I don't think there is any dispute over that anyway.

Mr. Gilmore: All right, your Honor.

(Testimony of Victoria Lindsey.)

Q. (By Mr. Gilmore): Now, have Bob and Loretta lived with you and your husband since the time of their adoption, that is, up until the time of these charges?

A. They have, except for Robert on the occasion when he ran away and was down at Boys' Town for several months.

Q. Did he run away more than once?

Mr. Munson: I object, your Honor.

The Court: Objection is sustained. It has already been sustained to a previous question. We are not investigating Bob Lindsey here or the time he ran away or anything.

Mr. Gilmore: I beg the Court's pardon. [225]

Q. (By Mr. Gilmore): Now, have you had any difficulty in bringing up or in raising Loretta since you have adopted her?

Mr. Munson: I object again, your Honor, as immaterial.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Now, Mrs. Lindsey, I am going to call your attention to a time in April of this year and ask you whether or not you remember one particular afternoon when Loretta was late in coming home from school. Do you recall such an instance?

A. Yes, I do.

Q. Can you tell us approximately when that was?

A. It was a day or two before Easter.

Q. And what did you do about it when she didn't come home from school?

The Court: Well, now, what is the purpose of

(Testimony of Victoria Lindsey.)

this line of questions? I just don't see the materiality of it. Will you disclose your purpose?

Mr. Gilmore: Well, it is simply, your Honor, it was just preliminary to the next question that will show that she did come home late and under what circumstances.

The Court: Well, but suppose she did come home late. I just don't see the materiality of it. What then?

Mr. Gilmore: Where she was before coming home. All [226] right. I will waive that question, if the Court please.

Q. (By Mr. Gilmore): And ask you when she did come home, as you recall, that day, about what time of the day it was?

Mr. Munson: I object, your Honor, as being immaterial.

Mr. Gilmore: Well, it is to what took place, your Honor.

The Court: But Loretta Lindsey is not under investigation here either. The fact that she might have come home late or——

Mr. Gilmore: It is simply preliminary to the charge, and of course the next question would relate directly to that.

The Court: Well, then, just skip the preliminary question, since it is of that nature, and ask her the question that you intended ultimately to ask.

Q. (By Mr. Gilmore): Now, when she did come home, did she come home alone, or was she with somebody? A. She was with my mother.

(Testimony of Victoria Lindsey.)

Q. And was there some unusual occurrence when she did come home that day, Mrs. Lindsey?

A. Just what do you mean by "unusual"?

Q. Well, was there some kind of a statement made or a charge made that day by Loretta?

A. Yes, there was.

Q. And go ahead and tell the jury please what that was, what [227] was said there.

The Court: But now——

Mr. Munson: I object, your Honor.

The Court: ——Here again we have the situation—was this question asked Loretta? If it wasn't, why, there is no foundation laid for it.

Mr. Gilmore: Well, I wonder if the Court would allow us now to call Loretta and ask her these impeaching questions, lay the foundation for them, because they are of tremendous importance and will be of value to the jury.

Mr. Munson: Well, your Honor, I oppose bringing that girl back, because we spent something like three hours yesterday afternoon in a rambling cross examination in which the defense had ample opportunity to bring out anything that might have been important to their case, and I object also on the ground that the testimony that is sought to be elicited is pure hearsay and that the witness on direct has already testified to most of the matters that they seek to elicit in any event.

The Court: Well, I don't remember exactly what she testified to, but it is elementary of course, as I have said so many times, that you can't impeach

(Testimony of Victoria Lindsey.)

a witness by asking a question of another witness that was never put to the witness sought to be impeached, and the only time that an exception is made and the witness permitted to be recalled is where you [228] didn't have knowledge of the evidence or that it was sheer inadvertence that you overlooked it, but ignorance of the rule certainly wouldn't justify calling the witness back.

Mr. Gilmore: Well, your Honor, of course the testimony that is attempted to be elicited is of course the original charge that the adopted daughter here made against her father to her mother, and of course is definitely a part of the *res gestae*——

Mr. Munson: Just a moment.

Mr. Gilmore: And I think she should be permitted if for no other reason, to be allowed to testify on that ground.

Mr. Munson: As the defense pointed out to me not too long ago, what happened on two or three days before Easter is not part of the *res gestae*.

The Court: No; it is not part of the *res gestae*. The situation resolves itself into this, that the witness Loretta Lindsey testified to a complaint that she made or something of that sort, but she was not asked the question that you now seek to ask of this witness, and, therefore, if the Court permitted you to ask this witness that question, he would be permitting the impeachment of some witness who never had the opportunity to admit or deny this conversation. You are apparently calling for a con-

(Testimony of Victoria Lindsey.)

versation, and the only way that you can get away from the hearsay rule is to show that [229] the witness Loretta made some inconsistent or contradictory statements at some other time than the time that she testified in the courtroom, and in order to get those in you have got to lay a foundation for them.

Mr. Gilmore: Well, if the Court please, I will proceed.

Q. (By Mr. Gilmore): And ask you, Mrs. Lindsey, whether or not Loretta made a charge that day against your husband concerning an assault or rape upon her?

Mr. Munson: I object, your Honor.

The Court: You can answer that yes or no, but you can't say what Loretta said in making the charge. You can answer yes or no that she made the charge.

A. Yes; she did make the charge.

Q. (By Mr. Gilmore): Did she also state, or did she tell you that her dad had threatened to kill her?

Mr. Munson: Objected to as leading, your Honor.

The Court: Unless the question has been asked Loretta, the objection has got to be sustained.

Q. (By Mr. Gilmore): Now, was that the first time that she had ever made a charge of that kind or an allegation of that kind against your husband?

A. Yes, it was.

Q. And were you surprised and shocked when you heard it? A. Yes, I was. [230]

(Testimony of Victoria Lindsey.)

Q. And, when you heard her make this announcement, did you feel and get the impression that she was lying to you?

Mr. Munson: I object, your Honor.

The Court: Her impression of course is immaterial. It is for the jury to say whether this is true or not. Objection sustained.

Q. (By Mr. Gilmore): Now, was Bob there that day? A. Yes, he was.

Q. And he was present when this charge was made by Loretta against Rollie?

A. Yes, he was.

Q. Do you remember whether or not about that time and place Bob went upstairs and then came back downstairs?

A. Well, when Loretta came in, he was in the kitchen doing dishes with the two boys that were staying with us, and my mother had wanted us to go in the bedroom because she said she had something she wanted to tell me, and I didn't figure that they could hear us in the kitchen, so I told her——

Mr. Munson: I object to this narrative, your Honor. She hasn't answered the question.

The Court: Well, you can just eliminate the details and answer the question. For instance, what might have happened in the kitchen is not material, and it is not important.

A. Well, when Robert, I mean, when Loretta came to the [231] house, Robert was in the kitchen with the boys, and, when she started to tell me about this, Robert and the boys went upstairs.

(Testimony of Victoria Lindsey.)

Q. All right. Did he come downstairs again shortly after that? A. Yes, he did.

Q. What did he do when he came downstairs?

A. Well, he joined in with Loretta in telling about the charges against Mr. Lindsey.

Q. And without saying what he said, what did he do? A. Well, he——

Q. Did he exhibit anything?

A. Well, he was busy visiting around, and finally he came over and took a little can out of his pocket and set it on the arm of the chair alongside of me and started towards the kitchen, but he said, "Here is the proof."

Q. And would you recognize that can if you saw it again? A. I believe I would.

Q. I show you this object and ask you if that is not the can or the object that he came down and placed on the side of the chair and said, "Here is the proof"? A. Yes; that is.

Q. Was there anything in it, or did you look in it?

A. Right at the moment I didn't open it. I lifted it up and looked at it and told him—he seemed to know quite a [232] bit about those things——

Mr. Munson: I object, your Honor.

The Court: That is immaterial here.

Q. (By Mr. Gilmore): Now, did you examine it later, the contents? A. Yes, I did.

Q. Was there anything in it?

A. There wasn't anything in it.

Q. Empty, the way it is now? A. Yes.

(Testimony of Victoria Lindsey.)

Q. Where did Bob get this; do you know?

A. From what he said, he just said that it was his dad's. He didn't say where he got it. I just saw him take it out of his pocket.

Q. I see. And he had gone up to his room just before exhibiting this?

Mr. Munson: I object to that, your Honor.

The Court: To what?

Mr. Munson: That he had gone up to his room. I don't think she said that. She said he had gone upstairs and came back downstairs.

The Court: Well, unless you know that he went up to his room, why, you wouldn't hardly be permitted to answer the question "Yes," simply because he asked it in that form, whether he went up to his room. Did he go up to his room? Do you [233] know that?

A. Well, from the way the house is situated, the front room is right underneath Loretta's room, and with the shoes that Bob wears, I would have heard him or the boys—they have cleats or something on their shoes—I would have heard them if they had gone into Loretta's room.

The Court: Well, but did you hear them at all upstairs so that you could tell what room he went into?

A. I heard him go upstairs, but I didn't hear him come across the floor over to Loretta's room, because there is quite a distance between the rooms.

Q. (By Mr. Gilmore): Do you know where this

(Testimony of Victoria Lindsey.)

has been since the time that Bob brought it down and threw it out there that day?

A. Well, it had been in my possession until I brought it down to the lawyer's office.

Q. Continuously since that day?

A. Yes.

Mr. Munson: No objection.

Mr. Gilmore: We offer this as defendant's exhibit.

The Court: What probative value has it?

Mr. Gilmore: The probative value of the motive on the part of the individual that produced it in support of this——

Mr. Munson: I object to its admission, your Honor, [234] on that ground.

The Court: That would depend on the testimony of the person, but standing alone that box is just like any other box, apparently. If there is no way of tracing it to somebody, why, it wouldn't serve any different purpose than any one of a thousand boxes of that kind. In other words, it has no probative value in and of itself.

Mr. Gilmore: Well, doesn't it appear as though he went up to his room, Bob did, and got it out of his room and then offered it in support——

The Court: Well, even if that were true, it has no evidentiary weight of itself any more than any one of a thousand of those boxes would, and so you have all the evidence in there on that that has any evidentiary value, and this serves no purpose. There is no use of cluttering up the record with it. If you

(Testimony of Victoria Lindsey.)

had some—if there was something on it that would identify it with some person or that would enable it to be traced to some person, why, then of course it would have evidentiary value.

Mr. Gilmore: I see. Well, I won't pursue the point. I just thought, it was in her possession continuously to this day or the lawyer's.

Mr. Munson: Your Honor, I would like to move that the testimony that was led out of this witness concerning the box being in Robert Lindsey's room be stricken on the ground [235] that there is no testimony to support it, except the inference from the question itself and that this witness has already——

The Court: Well, of course, that is true of a lot of answers that witnesses make. They might appear to be somewhat weak, but the weight of it is not a bar to its going before the jury.

Q. (By Mr. Gilmore): Now, I don't know whether or not I did, I don't think I did, ask you, Mrs. Lindsey, whether or not you believed Loretta when she made——

The Court: Yes, you asked her, and I ruled it was immaterial what her impression was. It is for the jury to determine whom to believe here.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Now, I will ask you, Mrs. Lindsey, whether or not, sometime after Loretta made this charge, whether or not you discovered a letter or whether Loretta wrote a letter to

(Testimony of Victoria Lindsey.)

the effect that her suitcase had been packed about a week before she told this story——

Mr. Munson: I object to leading the witness, your Honor.

Q. ——about her father?

Mr. Munson: I object to the leading of the witness and suggesting the answer in the question.

The Court: Well, I don't quite get the materiality of it. Is it the purpose to show that she intended to run [236] away from home?

Mr. Gilmore: Yes, your Honor; that she had it all planned. It was her plan and her scheme.

Mr. Munson: Now I object to it as immaterial, your Honor.

The Court: Well, it has got to show more than that, otherwise it is just an immaterial incident in the life of a witness.

Mr. Ziegler: Now, if the Court please, will you permit me to be heard on it?

The Court: Well, if you want to show something more than the mere preparation to run away.

Mr. Ziegler: Well, that was the reason we asked for a ruling on the statement, your Honor, because it appears from that statement that the reason she made the charges was she wanted to get away from home and that she was planning to get away from home. Now, that is the reason we wanted to have the ruling on it, to know whether we are going to be able to introduce this testimony. It is part of the motivation that the defense will prove in this case.

Mr. Munson: But the motivation of the complain-

(Testimony of Victoria Lindsey.)

ing witness is not a part of this case, your Honor.

Mr. Ziegler: Motive is always a question, if the Court please.

The Court: Yes; the motive of any witness can be [237] gone into.

Mr. Munson: But not to run away, your Honor; that is what I mean. Whether she had a motive to run away is immaterial.

The Court: Well, but the motive that he mentions is the motive to falsely accuse.

Mr. Ziegler: That is correct.

The Court: But again we have the situation here that the witness Loretta Lindsey was not asked that.

Mr. Ziegler: Not on the stand; no; but it is a conflicting statement that she made after she made the charge. It contradicts her statement that——

The Court: But before you can ask this witness about that, she should have been, Loretta Lindsey, should have been, asked that while she was on the stand.

Mr. Ziegler: Well, of course, I think the Court can understand our position on that. The affidavit that she made——

The Court: No. There is one thing you don't understand about this affidavit and my ruling, and that is this. Suppose you had never taken that affidavit there; would you mean to stand here and tell me that, therefore, you couldn't ask any questions about what occurred in your office? Why, it is perfectly absurd.

Mr. Ziegler: No. No, your Honor.

(Testimony of Victoria Lindsey.)

The Court: I have told you all the time that you [238] could ask any question you wanted as to the occurrence in that office with relation to the taking of this affidavit but you couldn't read from the affidavit.

Mr. Ziegler: Not until the Court rules on it.

The Court: You could question about the incident in the office without any ruling of the Court whatever.

Mr. Ziegler: Yes, the circumstances in taking it, but nothing with respect to the contents of the affidavit.

The Court: Certainly; but, as I say, suppose you had never taken this affidavit, you could have questioned Loretta Lindsey on everything that anybody remembered.

Mr. Ziegler: Oh, yes; that is true.

The Court: And so the only bar set up by my ruling is that you couldn't read from the affidavit itself, so, since you are not precluded by my ruling from putting in any evidence of that kind, why, I can't do anything now but sustain the objection to the question that has been asked this witness because it has not been asked Loretta Lindsey.

Mr. Ziegler: Well, if the Court please, as I understand it, we can't prove motive or her reason for making this charge.

The Court: Yes, you can prove motive, but, if you are going to prove motive by what somebody did or said, by what Loretta Lindsey did or said, you should have asked her about it when she was

(Testimony of Victoria Lindsey.)

on the stand so she would have the [239] opportunity to either admit or deny it.

Mr. Ziegler: She will have plenty opportunity to deny it after the statement is introduced.

The Court: Except that you would reverse the order in which such evidence must go on, and that is that, before you can impeach a witness by showing a motive or anything of that kind, you have got to put the question to her first.

Mr. Ziegler: Well, of course we can't—

The Court: For instance, you can see how unfair it would be, if you brought out from this witness, let us say, the fact that Loretta Lindsay was very hostile to her father and had trouble with him, without having asked Loretta Lindsey about this trouble when she was on the stand. That is the whole nub of the objection here.

Mr. Ziegler: Well, until we have a ruling on this admissibility of the affidavit of course we will probably have to depart from this one question, which we will do in compliance with the Court's ruling.

The Court: That isn't the basis of the Court's ruling. The basis of the Court's ruling on this, as on a few others, has been that Loretta Lindsey was not asked the same question when she was on the stand and given an opportunity to deny or explain it or admit it.

Mr. Munson: For the record, your Honor, I would like to urge another ground of objection, on the ground of [240] irrelevancy, that the running away from home or any acts or statements con-

(Testimony of Victoria Lindsey.)

cerning running away from home do not tend to have any probative value.

The Court: Well, but counsel does not claim that that is his purpose. Counsel claims that he intended to show that she had formed the intent to run away and, therefore, had a motive to make this accusation, and, of course, he would be allowed to show that had he asked her the question when she was on the stand.

Mr. Munson: But the running away could be equally consistent with the Government's case.

The Court: Yes; but it isn't a mere running away. You have to connect the running away with something that would tend to show motive.

Q. (By Mr. Gilmore): Now, after these charges or this charge was made against your husband by Loretta, do you know whether or not Loretta went to Wrangell?

A. I had heard that she was there, and a friend of mine had gone up there and seen her and told me that she saw Loretta up there.

Q. Now, when did Loretta return to Ketchikan from Wrangell? Do you remember that?

The Court: You can mention the date. There is no dispute about when she returned.

Q. (By Mr. Gilmore): Do you recall on or about August 25, [241] 1954, the 25th of August, this year, seeing Loretta? A. Yes.

Q. And where did you see her?

A. At my home.

Q. And about what time?

(Testimony of Victoria Lindsey.)

A. Between nine and ten in the morning.

Q. And tell the jury now the circumstances of your seeing her that day?

A. Well, I had got up to fix a bottle for the baby, and Rollie was up and in the bathroom, and I heard a knock at the door. I went to answer the door, and Loretta was there, and she said, "Hi, Mom." I didn't say a word to her and went and knocked on the bathroom door and told Rollie that what's-her-name was here.

Q. Loretta?

A. Well, he asked, "Who is there?" And I said, "Loretta." And so he said, "Just a moment and I will be out."

Mr. Munson: I object, your Honor, to all this hearsay and narrative and immaterial testimony.

The Court: The objection is sustained to any conversation.

Q. (By Mr. Gilmore): What took place after you called your husband? Did he come out?

A. He came out.

Q. And then what conversation took place in his presence [242] there?

Mr. Munson: I object.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Was Loretta let in the house? A. No, she was not.

Q. Did she announce the purpose of her coming to your house? A. Yes, she did.

Q. What did she say she came there for?

Mr. Munson: I object again, your Honor.

(Testimony of Victoria Lindsey.)

The Court: Objection sustained.

Q. (By Mr. Gilmore): After you and your husband denied her at first entrance to your home and after she announced her purpose in coming there, did you then let her into your home?

A. Yes, we did.

Q. How long was she in your home that morning, approximately?

A. About fifteen or twenty minutes.

Q. And where was she; what part of the house was she in while she was there?

A. In the front room.

The Court: She can testify to the fact that Loretta told her that she wanted to drop the charge, if that is the fact, but she can't relate any conversation about it because the conversation wasn't related to Loretta.

Q. (By Mr. Gilmore): Well, did she come there, did she tell [243] you she came there to drop the charges and tell the truth? A. Yes, she did.

Q. Now, what part of the house was your husband, Rollie, in? What was he doing after your daughter came?

Mr. Munson: I object, your Honor.

Q. Or were they together?

The Court: Were who together?

Mr. Gilmore: That is, Rollie and Loretta.

The Court: Well, I suppose it is preliminary, because standing alone it certainly would not tend to prove or disprove anything.

(Testimony of Victoria Lindsey.)

Mr. Gilmore: Well, your Honor, going again to the——

The Court: Well, I am not sustaining the objection, so go on.

Q. (By Mr. Gilmore): Well, what was your husband doing while she was there, and where was she, what part of the house was she in?

A. Well, Loretta was with me in the front room, and Rollie had gone to call the lawyer and also to get dressed.

Q. In other words, he called the lawyer immediately after Loretta announced that she came there to drop the charges and tell the truth; is that right?

A. Yes.

Q. What took place after Rollie made the phone call and got [244] dressed?

A. Loretta asked where the children were and she wanted to see them.

Q. Now, while she was there, when she came there that morning, did she say anything about writing you a letter? A. Yes, she did.

Q. Had you yet received a letter from her?

A. No, I hadn't.

Q. Had you received any letters from her while she had been in Wrangell up to that time?

A. No, I hadn't.

Q. Did you later receive letters from her?

A. On either that afternoon mail or the next afternoon; I am not positive which.

Q. All right. Now, after your husband finished

(Testimony of Victoria Lindsey.)

the telephone call and finished dressing, what did he do then?

A. Well, he and Loretta went on down to the lawyer's office.

Q. Do you know the purpose of their going there that morning?

A. She was going to make statements, tell the truth, and say she was going to drop the charges against my husband.

Q. And that was the very first thing she said to you when she came to your house that day and before you let her in the house; is that right?

A. That is true.

Q. Did you see Loretta again that day after she left the [245] house that morinng for Mr. Ziegler's office?

A. Yes. She was up two or three times.

Q. And she was friendly? A. Yes.

Q. Showed no animosity toward her father or you? A. No.

Q. And did she continue to visit in your home after that day——

Mr. Munson: I object——

Q. ——for sometime?

Mr. Munson: I object to this immaterial testimony, your Honor.

The Court: Well, I think it has already been gone into, but, if you want to lead up to something else, she can testify to it without there being any dispute over it, that she stayed there for sometime.

(Testimony of Victoria Lindsey.)

Q. (By Mr. Gilmore): Did she continue to visit in your home?

A. Yes; several times.

Q. Now, did she say how she happened to leave Wrangell, how she happened to come home?

A. Yes, she did.

Q. Who had she been staying with there; do you know?

A. Well, she told me that she was staying with Jack Krepps, the United States Marshal up there, and that he was the one that sent her home. [246]

Q. Did she tell you that she made a charge, an accusation, of rape against him?

The Court: Well, now, again we are back to where we started from. No question of this kind was asked Loretta.

Mr. Ziegler: She testified to it anyway.

Mr. Gilmore: Yes, she did. She testified she was pregnant by Jack Krepps.

The Court: But she did not testify, or did not deny, wasn't asked, about any conversation had with this witness, and so this witness cannot be asked about it. She was asked about her conversation with the Krepps and testified to it.

Q. (By Mr. Gilmore): Did she make a statement to you regarding Miss Seliotes, Mrs. Lindsey?

Mr. Munson: Objected to for the same reason, your Honor.

A. Yes.

Mr. Ziegler: Now, if the Court please——

(Testimony of Victoria Lindsey.)

The Court: It is a preliminary question, I assume.

Mr. Ziegler: Well, no, it isn't a preliminary question. The question may not be in proper form, but Loretta was asked specifically on the stand on cross examination if she didn't make the statement to Mrs. Lindsey to the following effect, "Didn't Miss Seliotes say to you, 'Would you rather see your father go to jail, or would you rather go to jail for perjury'?" She was asked that, your Honor.

The Court: I don't remember any such question.

Mr. Munson: The question was objected to and sustained.

The Court: There was something asked her about what she said to Miss Seliotes, but it isn't Miss Seliotes who is on the stand.

Mr. Ziegler: I know Miss Seliotes isn't. We are not trying to impeach Miss Seliotes. We are trying to impeach Loretta.

The Court: You are trying to impeach Loretta.

Mr. Ziegler: And she was asked if she didn't make that statement.

The Court: She was not asked, as I recall, about any conversation with Mrs. Lindsey at that time.

A. Yes, she was.

Mr. Ziegler: Yes, she was, your Honor. I think the record will so show. I will appeal to the record if there is any doubt about it.

The Court: I think the record will show that there was no foundation laid for this particular question, particularly as to the time, place and per-

(Testimony of Victoria Lindsey.)

sons present, because I have a rather clear recollection about what conversations Loretta was asked about, and there were very few. There was no foundation laid of the kind required by statute.

Mr. Ziegler: Maybe it wasn't broad enough to comply but I think—— [248]

The Court: It has got to name the time, place and persons present, otherwise it is deficient.

Mr. Ziegler: Well, I can't recall the exact testimony.

Mr. O'Connor: If it please the Court, I have in my notes here, and I think the record will show, at the very beginning, the first question asked Loretta at the time of cross examination, the question went, "Did Miss Seliotas of the Welfare Department talk to you about the statement" and so forth "and did she ask, 'Would you rather go to jail' "——

The Court: That is my recollection.

Mr. O'Connor: And then the question further went, "Did you tell Mrs. Pawsey that?" There was no such question about "your mother".

The Court: There isn't any foundation laid for this question.

Q. Did Loretta from the time you first saw her that morning and subsequent times during that day ever give you or give any indication that she was making a retraction of this statement and dropping the charges and wanting to tell the truth because of any influence by Rollie?

The Court: That is just getting the conversation out of her by embodying it in the question. That

(Testimony of Victoria Lindsey.)

is just another way of trying to ask something that the ruling precludes being asked. [249]

Q. (By Mr. Gilmore): Mrs. Lindsey, you heard Loretta testify today that—of all these many acts, immoral and improper acts, committed upon her by your husband, Rollie, while living in your home, under your roof. Did you ever see any evidence of any improper acts committed by your husband on Loretta at any time? A. No, I didn't.

Mr. Gilmore: You may take the witness.

Cross Examination

Q. (By Mr. Munson): Mrs. Lindsey, did you just testify a few minutes ago that on the morning of August 25th that you got up around nine o'clock, between nine and ten, to get a bottle for the baby?

A. Yes.

Q. And that shortly after that you started breakfast, having breakfast?

A. No; I didn't say anything about breakfast.

Q. Is that the normal time you would be eating breakfast, about nine o'clock in the morning, nine-thirty or ten o'clock?

A. Somewhere around about then.

Q. You are a pretty heavy sleeper, aren't you?

A. No, I am not. [250]

Mr. Gilmore: I object, if the Court please. There is no evidence——

Mr. Ziegler: That is all right. Withdraw the objection. Let him go ahead.

(Testimony of Victoria Lindsey.)

Q. (By Mr. Munson): I didn't hear what your answer was.

A. I said, no, I wasn't a heavy sleeper.

Q. You are not a heavy sleeper?

A. No, I am not.

Q. Is this the normal time for the babies to wake up, nine o'clock in the morning?

A. Not especially.

Q. What time do they normally wake up?

A. Anywhere from seven o'clock, six o'clock, eight o'clock, nine o'clock.

Q. You mean they have no regular time?

A. No, they do not.

Q. They wake up maybe six o'clock one morning and between nine and ten on another?

A. The three little ones, you can't keep them all asleep at a regular time.

Q. Well, I am talking about the baby now, the one with the bottle.

A. He doesn't have any regular, he doesn't have a set schedule.

Q. Now, when Loretta was staying with you, who normally got [251] up and took care of the baby in the morning?

A. I did.

Q. You did?

A. Yes.

Q. And you would get up anywhere—six, seven, eight, nine o'clock in the morning?

A. At different times. It wasn't a set schedule, as I said.

Q. Were there times, can you recall times when your husband was home, when you would wake up

(Testimony of Victoria Lindsey.)

early in the morning and notice that he wasn't in your bedroom?

A. No, I don't believe I do.

Q. You don't recall any? A. No.

Q. Do you recall times when you were out in the kitchen cooking supper and taking care of the kids—you have three children, haven't you?

A. Yes, I do.

Q. When you were out in the kitchen taking care of the kids and you noticed that Loretta wasn't around and that Rollie wasn't around and you came out looking for them, do you recall asking Bob Lindsey one time or a couple times where Rollie was?

A. I may have done that several times. Our house is a large house, and I may have wanted Loretta for something and just looked for her and may have asked Bob several times. [252]

Q. Do you recall Bob answering you that "They are upstairs"?

A. He could have answered that; I don't say he did; because my husband has gone upstairs numerous times to check on Loretta's room to see what condition it was in.

Q. He used to go up and check on her house-keeping in her bedroom; is that it? A. Yes.

Q. When you say "check up" on her room, I presume you mean the cleanliness and the order of the room? A. That is right.

Q. Do you recall any times that he told Loretta to go up and clean up her room and then a little

(Testimony of Victoria Lindsey.)

while later he would go up and stay up there quite a long time?

A. He had told her on numerous occasions to go up to clean up her room, and he went up later to check up on her, but he wasn't gone very long.

Q. You know that? A. Yes.

Q. Are there other times that you can remember when you looked for him and her and you didn't find them around and asked Bob where they were, and he said, "They are upstairs," and you went back to the kitchen? A. No, I don't.

Q. Have you ever gone upstairs while Rollie and Loretta were upstairs to see what was going on, to see what they [253] were doing?

A. No. I have no occasion to do it.

Q. You just never went upstairs while Rollie was up there?

A. Not that I recall. I don't remember.

Q. Now, you said that the upstairs of your house is quite large; didn't you just testify that there is——

A. Quite a large house.

Q. ——quite a lot of space up there?

A. Yes.

Q. And you said that Loretta's room was on this end of the house. Was Bob's room on the other end?

A. Yes; facing this way. Loretta's room was over on this side, and Bob's was down the other way.

Q. So that they had the whole house in between them? A. Yes.

Q. Quite a lot of space? A. Yes.

(Testimony of Victoria Lindsey.)

Q. So that, if you were in the kitchen, you wouldn't be able to hear someone walking around, say, in the area halfway between Loretta's room and Bob's room?

A. The kitchen is situated about halfway between those rooms.

Q. Oh, it is situated about halfway in between?

A. Yes.

Q. So that you would be able to hear? Do the boards squeak or something? [254]

A. No.

Q. I mean, you just hear normal footfalls? Nothing real squeaky or creaky?

A. No.

Q. And, when you were occupied with cooking supper, you weren't paying any attention to footfalls, were you?

A. Not especially.

Q. In fact there was quite a lot of noise with the kids in the kitchen and food being cooked, and it is likely that you wouldn't hear anything at all, isn't it?

A. It is possible.

Q. The kids usually cry about that time of the night, don't they?

A. Sometimes.

Q. Do you know of any time when Loretta went down to Rollie's boat?

A. Any specific time?

Q. Any time.

A. She has gone down to the boat several times.

Q. Several times. You know that?

A. Yes.

Q. How do you know it?

A. Because my husband usually came in from trolling trips and he would call up for Bob to come

(Testimony of Victoria Lindsey.)

down, or, if he had been home, been in, on a Friday night, he would tell Bob [255] they were going to go down and unload their fish in the morning, and, generally, Loretta would get all ready to go down and want to, and, if I had insisted that she stay home to help me, she would get mad at me because I would not let her go down.

Q. She liked to go down? A. Yes.

Q. Can you recall any time when Rollie called up, called you up, and asked for Loretta to come down and bring down some oil rags or something for the boat?

A. He has phoned the house several times to have different ones come down with different things for the boat.

Q. I mean, there is nothing unusual about that?

A. No, there isn't.

Q. You said that a friend of yours went over to Wrangell to see Loretta?

A. She didn't go over to see Loretta. She was up there on her own business, but, when she came back, she had thought she had told me when we were walking down to——

Q. Now, I just want to know now whether this friend of yours, who went over to Wrangell, got in touch with Loretta?

A. She ran into Loretta on the street, and she said Loretta told her that——

Q. Wait a minute now. She ran into Loretta on the street?

A. She was downtown shopping. [256]

(Testimony of Victoria Lindsey.)

Q. But she hadn't gone over there—I mean, you hadn't seen her and said, "If you are over in Wrangell, how about looking up Loretta?"

A. The first that I heard that Loretta was in Wrangell was when this friend of mine told me.

Q. How has Loretta been with the children? Has she taken care of them quite a bit? A. She has.

Q. She has been pretty good with the kids, hasn't she?

A. Up until shortly before she left home.

Q. That was one of her duties around the house, was just taking care of the younger children?

A. Yes.

Q. She probably spent as much time with them in that capacity, changing their diapers and feeding them, as you have, hasn't she, except when she was in school of course? A. Probably.

Q. And during the summertime when she was around the house she became more or less a second mother to those kids, didn't she?

A. Probably.

Q. She still thinks quite a lot of them, doesn't she? After she came to see you in August, came back to the house, and made this reconciliation with you, what was the first thing that she wanted to do? See the kids, wasn't it? [257]

Mr. Ziegler: Now, if the Court please, we have not been objecting to a lot of this questioning as not proper cross examination, but, when counsel interjects the word "reconciliation", I don't think the testimony justifies reconciliation.

(Testimony of Victoria Lindsey.)

Mr. Munson: I don't know what other word to call it.

The Court: Well, maybe counsel can suggest some word to call it. Making up—is that objectionable?

Mr. Ziegler: Well, it is not cross examination anyway, your Honor. We haven't objected to——

Mr. Munson: Your Honor, I would like a ruling on——

Mr. Ziegler: The question is not cross examination.

The Court: What is the question now?

Mr. Munson: I just asked her how Loretta got along with the kids, and then I asked her if wasn't the first thing after she came back to the house, during those fifteen minutes that she was there, wasn't the first thing she did would be to ask to see the kids.

Mr. Gilmore: That would be immaterial, too. if the Court please, I think, because the main thing here is that we know she came home to make this retraction, and whether she mentioned the children is immaterial.

The Court: Well, her relations with the defendant and his family are material and it is within the scope of the direct examination because there was direct examination about [258] her return from Wrangell. Objection overruled.

Q. (By Mr. Munson): Did you answer that question "Yes"?

(Testimony of Victoria Lindsey.)

A. I don't believe I knew what the question was and I didn't answer it.

Q. It was about whether she asked to see the children when she came back from Wrangell.

A. Yes, she did.

Q. Now, you said that—defense counsel was very careful now to elicit this testimony from you—that on the day that Loretta first informed you about the relationship, the relations that had been going on between her and Rollie, that that was the first time she had made such a statement. Now, what you meant was that was the first time she had ever said that to you; isn't that what you meant?

A. Yes, it is.

Mr. Ziegler: What statement are you referring to, Mr. Munson?

Mr. Munson: The charges against the defendant.

Mr. Ziegler: Oh.

Q. (By Mr. Munson): Now, I want to ask you about an incident, Mrs. Lindsey. The place is your home. The people present are the defendant, Loretta, her grandmother, and you; I believe that is all. The conversation concerns this case and the dropping of these charges. Do you recall Loretta saying, "Well, what about the medical examination [259] I had that shows that I am not a virgin?"

A. I have never heard Loretta say anything about it.

Q. Did you hear Rollie say in response to that—

Mr. Gilmore: Just a moment, if the Court please.

(Testimony of Victoria Lindsey.)

She answered she didn't hear the question. How could she hear an answer to the question she didn't hear? She said, no, she didn't hear the question. Now he says, "Well, did you hear the answer?" She said she didn't hear the question.

The Court: Well, of course he is not foreclosed by a negative answer on cross examination. It isn't like direct examination. He may pursue the matter until he is satisfied without too much repetition. Now, in this case it is just merely cross examination by calling her attention to what the defendant is supposed to have said.

Q. (By Mr. Munson): Do you recall Rollie saying to Loretta, "Tell them that you stuck a banana up you"?

A. I never heard any such thing.

Q. After this case began, Mrs. Lindsey, you heard your grandmother state that she took Loretta out of the house?

A. You mean my mother?

Q. Yes; your mother; her grandmother; that she took her out of the house and brought her down to her house. Did you or Rollie thereafter go up and make a search of Loretta's room?

A. Yes. [260]

Q. And did you find anything in the room other than, well, did you find some letters, these letters, that were sought to be introduced yesterday by the defendant, those cards; is that where you found them? A. Yes, I did.

Q. And did you find anything else up there?

(Testimony of Victoria Lindsey.)

A. No, I did not.

Q. You didn't find any cotton wads or cotton balls in Loretta's closet, did you?

A. No, I did not.

Q. But you searched the room? A. Yes.

Q. Looking for evidence?

A. I was not looking for that type of evidence. I was looking for some, for a certain letter that I had seen prior to the charges that Loretta had made, which made me not believe her when she was making the charges.

Q. I don't blame you for trying to get in these self-serving statements, but the question was——

Mr. Ziegler: We object to that remark, if the Court please. Counsel can move to have the answer stricken, but I don't think it is fair to make a remark of that kind to this witness.

Mr. Munson: I move that her answer be stricken as being unresponsive to the question. [261]

Mr. Gilmore: And we move that counsel's remark to the witness be stricken.

Mr. Munson: I withdraw the remark.

The Court: Well, of course, the statement speaks for itself, and it is not necessary to characterize it, since on motion it must be stricken as not responsive.

Q. (By Mr. Munson): Mrs. Lindsey, did you ever ask Rollie about that "Trojan" can that Bob said he got on the rafters between his room and Loretta's room? A. I believe I did.

(Testimony of Victoria Lindsey.)

Mr. Ziegler: What was the answer? I didn't hear it.

Court Reporter: "I believe I did."

Q. (By Mr. Munson): Now, after Loretta's return from Wrangell, not too long afterwards, maybe two weeks afterwards, you had a birthday party for her, didn't you?

A. Well, we invited her for dinner.

Q. Did you give her some presents?

A. Yes.

Q. Wasn't that about the first time in four or five years that she had had a party or presents given to her on her birthday?

A. I don't recall just how long it had been.

Q. But it could have been the first time in four or five years that she was given presents on her birthday? Her birthday is September 15th; is that correct? It was [262] approximately two weeks, maybe three weeks, after she——

A. Her birthday is September 15th, but the year before I had bought her a birthday present.

Q. What?

A. It was a nylon slip, which after she left I found cut in half or torn in half.

Q. What did you buy her this year?

A. A little cosmetic, or something to keep cosmetics in.

Q. Did Rollie buy her something?

A. He picked out the gift.

Q. Oh, he picked it out.

A. I asked him, and he was downtown—with

(Testimony of Victoria Lindsey.)

three little ones; I don't get uptown very often—and he was downtown and called up and asked if I wanted anything or needed anything, so I asked him——

Q. You mean, for Loretta's birthday?

A. Yes.

Mr. Munson: No further cross examination.

Redirect Examination

Q. (By Mr. Gilmore): Just to make perfectly clear, Mrs. Lindsey; Mr. Munson inquired of you, asked of you, whether or not that at times you would inquire of Bob where Loretta and Rollie were and that he would say, "Upstairs," and then that you [263] would do nothing about it. What would be the times that he would be absent? For instance, if he and Loretta were upstairs at the same time, as I suppose happened many times—did it not? A. Yes, it did.

Q. All right. What, generally speaking, would be the length of time that they would be up there at the same time?

A. Well, it would be just a few minutes.

Q. Well, the question that was asked of you, at least my understanding of it, implied that they would be up there alone for some protracted time and that you would do just nothing about it even thought it was over a long period of time. Is that true or not true?

(Testimony of Victoria Lindsey.)

A. I didn't quite get that.

Q. Would they be up there for any long periods of time together that you knew of?

A. No, they wouldn't.

Q. Never at any time to your knowledge?

A. No.

Mr. Gilmore: I believe that is all.

Recross Examination

Q. (By Mr. Munson): Well, Mrs. Lindsey, didn't you just tell me a few minutes ago that you just don't remember whether they were up [264] there a long period of time or not, that you were too busy in the kitchen; there was so much noise that you just didn't pay any attention to them and that you never went upstairs while they were alone; at least you said that you had never gone upstairs while they were up there together; isn't that correct?

A. The last part of your question is correct.

Q. How about the first part?

A. Would you state that again?

Q. That you told me that you didn't pay too much attention to what they were doing; you were too busy in the kitchen with cooking and the kids?

A. Well, dinner didn't take too long to get, generally, so I didn't figure it was more than a few minutes that they would be up there.

Q. Well, it takes more than a few minutes to cook a supper, doesn't it? A. Yes, it does.

Q. It could take as long as forty-five minutes

(Testimony of Victoria Lindsey.)

to cook a supper and to feed three babies, or one baby?

A. I was busy.

Q. Isn't it a fact that you just don't remember, that you didn't pay any attention to it, except for the one, two or three times that you came out and asked Bob where they were and that even after you were told you never went [265] upstairs; isn't that the truth?

A. That is true; I never went up there and never paid too much attention to it.

Mr. Munson: That is all.

Redirect Examination

Q. (By Mr. Gilmore): Mrs. Lindsey, regardless of the number of times or the occasions when your husband, Rollie, and Loretta may have been upstairs, did you ever suspect or have any suspicion that there was anything wrong going on in your home?

Mr. Munson: I object, your Honor.

The Court: Well, it is obvious from her entire testimony that she never suspected anything.

Mr. Gilmore: Very well.

Mr. Munson: Is this re-redirect?

The Court: Mrs. Lindsey, you have been shown this box that has been exhibited here. Do you know what boxes of that kind contain; do you?

A. When that was presented to me, that was the first time I had ever seen a box of that sort.

The Court: But did you know what boxes of that kind contained?

(Testimony of Victoria Lindsey.)

A. After I had seen it, I knew. [266]

The Court: Somebody told you, or did you read on it? A. I read on it.

The Court: That is all.

Mr. Gilmore: That is all. No further questions.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows:

Mr. Ziegler: If the Court please, the trial has proceeded faster than we anticipated, and we have some other witnesses that we intended to have first thing in the morning, and they are not here, and we would like very much to call the other witnesses before we call the defendant.

The Court: Well, I think this trial has been dragging along interminably, and, as I said here the other day, I fear that we are going to run into Thanksgiving Day here. I lost twenty minutes yesterday, not knowing that it was going to drag out like this, and you will have to go on.

Mr. Ziegler: The Court is not willing to let it go until morning until we get those witnesses?

The Court: As long as you have any witnesses——

Mr. Ziegler: We don't want to call them out of order, but, if the Court insists on it, we will do it.

The Court: Well, the order isn't very important [267] anyhow.

Mr. Ziegler: Well, I disagree with the Court. To us it seems very important.

The Court: Well, I don't want to recess or adjourn at this time because we are going to have great difficulty getting through tomorrow at a reasonable hour.

ROLLAND LINDSEY

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Rolland Lindsey.

Q. And where do you live, Mr. Lindsey?

A. Woodland Avenue, Ketchikan, Alaska.

Q. And what is your occupation?

A. Fisherman, logger, trapper.

Q. How long have you lived in Ketchikan?

A. Approximately fifteen years.

Q. You are married, are you? A. Yes.

Q. How many children do you have?

A. We have three of our own and two adopted children.

Q. And what are the names of your adopted children? A. Bob and Loretta. [268]

Q. And when did you adopt those children?

A. It was either in 1946 or '47; I am not sure of the year.

Q. Now, what ages were they, respectively, approximately?

A. Loretta was between seven and eight, and Robert was eleven, I believe.

Q. Now, during the time that you had Bob and

(Testimony of Rolland Lindsey.)

Loretta, or let's confine it to Loretta, have you had some trouble with raising Loretta in your household? A. We certainly have.

Q. Has Loretta been caught by either you or your wife in thefts in your home?

A. Yes, she has.

Mr. Munson: I object, your Honor. The witness should be instructed not to answer until the objection is completed.

The Court: The answers are stricken, as before questions of that type can be asked you have got to lay the foundation by asking whether the witness is hostile, otherwise it may become absolutely immaterial.

Mr. Gilmore: Well, your Honor, I will ask that question.

Q. (By Mr. Gilmore): Mr. Lindsey, do you know whether or not your adopted daughter, Loretta, has acquired a hostile feeling toward you?

A. I do. [269]

Mr. Munson: I object to that, your Honor, on the ground——

The Court: It has got to be before the bringing of these charges.

Mr. Gilmore: Very well.

Q. (By Mr. Gilmore): Was it acquired before the bringing of these charges? A. It was.

Q. And can you explain the reasons why she acquired this hostility toward you, and tell us over what period of time it existed?

Mr. Ziegler: Now, just a minute, Mr. Lindsey.

(Testimony of Rolland Lindsey.)

Let me interject this. Don't answer any questions until counsel for the Government has an opportunity to object.

Mr. Munson: I object for this reason, your Honor, that this witness is being asked substantially the same impeaching questions that were asked the other defense witnesses, none of which have had a foundation properly laid.

The Court: But he is not calling for any conversation by this question. He can testify, the witness can testify to acts, as distinguished from conversation, from which acts hostility might be inferred, and of course no conversation could be—he could be asked about no conversations that Loretta had not been asked about.

Q. (By Mr. Gilmore): Now, Mr. Lindsey, with reference to [270] the hostility that was acquired towards you by Loretta, can you name some specific acts that might have led to that feeling on her part toward you?

A. Well, I just want to be sure that I can answer the question in court.

Q. All right. You may answer it.

A. Yes. Do you mean to say from stealing, lying?

Q. Yes. Now, have you ever had to discipline Loretta?

A. Very many times.

Mr. Munson: Your Honor, I object. This man is the girl's adopted father.

The Court: Before he can relate such things as instances of stealing and all that, he has got to

(Testimony of Rolland Lindsey.)

show by his testimony that she is hostile because of these things because of what he did, otherwise he is just simply saying something for the purpose of getting other evidence in. In other words, he has got to show how he knows that she is hostile or was hostile toward him before bringing the charges.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Now, have you had occasion to discipline Loretta during the years that she has lived with you? A. Yes.

Q. And tell the jury some of the instances or some of the acts that were committed that led to the necessity for your taking her to task. [271]

Mr. Munson: Your Honor, I don't believe that this question is in accordance with the Court's ruling on hostility.

Mr. Gilmore: I am trying, your Honor. It is the discipline that was enforced, the rigid discipline that was enforced, the hostility that followed.

Mr. Munson: Now, then, counsel is testifying for the defendant, your Honor.

Mr. Gilmore: No, I am not. He said those very things, counsel.

The Court: Well, the acts have got to be, of course, something from which it would be reasonable to infer hostility, and just ordinary acts of discipline would hardly have that tendency, and it seems to me they ought to be accompanied by testimony showing that Loretta was by her conduct and attitude hostile toward him.

Mr. Gilmore: Well, I am trying.

(Testimony of Rolland Lindsey.)

The Court: Just like, he could correct her for something he said here about stealing, and maybe she would feel more penitent than hostile if she was caught in a theft or something, so there has to be something that would indicate open hostility on her part.

Mr. Gilmore: I know, but I have just been trying to develop that by showing that she was disciplined and severely on numerous occasions and the reasons, the occasions for it, and then the hostile feeling that was acquired toward [272] her father.

The Court: The showing of hostility should come first before you begin putting in evidence of acts of that kind.

Mr. Gilmore: Well, except that——

The Court: Otherwise the witness could be greatly prejudiced by putting in evidence of various acts, and then you fail to show hostility.

Mr. Gilmore: Sure, your Honor; but I thought he just testified that there has been over a period of years a feeling, a strong feeling of hostility.

The Court: Yes, he did testify to that, but that is just, you might say, a categorical answer. He has got to show first why she was hostile. In other words, he has got to testify to more than that there was a feeling of hostility. He would have to show what evidenced that hostility. In what way did she show that hostility?

Q. (By Mr. Gilmore): Go ahead and tell us that now. In what way over the years, starting

(Testimony of Rolland Lindsey.)

when she was young, did she evidence hostility towards you, such as you testified?

A. She ran away many times.

Q. And what were the reasons for it?

A. Her excuse for that was that her folks were too strict with her. [273]

Q. And what would happen to her when she came home from running away?

A. We would talk to her and try to explain to her that she had to do certain things and quit doing certain things that she had done. I spent hours with both of the children and talking to them at the supper table.

Q. Was she disciplined and restricted?

A. She was.

Q. And how did she take it?

A. They could look right through you, and you wouldn't know how they was taking it.

Q. Which resulted in what kind of a feeling or relation towards you? In other words, did she acquire a respect for you after you disciplined her, or was it some other feeling?

A. I don't quite understand the question the way you put it, Mr. Gilmore.

Q. Well, it is simply this. After you would discipline her and catch her in these acts and after she would return to home from running away, and you restricted her and disciplined her, would her feeling after that be repentance, or would it still be hostility?

A. She would turn around and do the same

(Testimony of Rolland Lindsey.)

things again. It would be only just a short time, and she would do that.

Q. Was she obedient to you, or disobedient?

A. Disobedient.

Q. Did you ever catch her in any actual thefts of substantial sums of money from your home?

Mr. Munson: I object, your Honor. He still hasn't shown any hostility.

The Court: The difficulty, as I see it here, of showing hostility is that, while acts of this kind were they to be such from which hostility might be inferred in the case of a third person who made an accusation, here it is a foster child of the defendant, and all these incidents to which he is testifying so far are the ordinary, or it seems to me the ordinary, incidents of childhood, and they are not, it seems to me, standing alone without more, sufficient to warrant an inference of hostility.

Mr. Gilmore: Except it could be shown they are extraordinary, I think, your Honor, that this witness will testify to.

The Court: Well, for instance, suppose that we had the case of a girl unrelated to the defendant, and he could certainly show that he slapped her one day down the street for, perhaps, no good reason, and she has been hostile to him, and anybody could reasonably infer hostility from that, but, if he says he slapped his own foster daughter in the course of enforcing discipline within his own home, why, it certainly doesn't have any tendency to establish

(Testimony of Rolland Lindsey.)

hostility. That is the [275] difficulty. So it seems to me that you would have to show more than the ordinary incidents that occur in the lifetime of practically every child.

Q. (By Mr. Gilmore): Did she ever threaten to leave your home and at the same time tell you and your wife that she was going to her real mother or going to some other relative or something like that in defiance of your parental authority?

A. She did.

Q. Well, tell us of an instance?

A. She has always——

The Court: Well, I think that, before he is allowed to testify about these incidents any more, you will have to show that there was hostility at the time of bringing this charge, otherwise the presumption would be that any child would get over any feeling of resentment as a result of punishment.

Q. (By Mr. Gilmore): Did this situation that I have just asked you about, and that is with reference to her threat to leave your home and go with her real mother or some other relative, exist prior to the bringing of these charges against you?

A. Yes.

The Court: It should be—exist right up to the bringing of the charges. [276]

Mr. Gilmore: Pardon, your Honor?

The Court: Prior to bringing the charges might be two years before the charges. It has got to exist at the time of bringing the charges.

Q. (By Mr. Gilmore): But continued up to—

(Testimony of Rolland Lindsey.)

it was a continuous feeling, was it, or was it not?

A. It was.

Q. A continuous feeling of hostility that existed and continued to exist? A. Yes.

Mr. Munson: I object to counsel's leading this witness, your Honor.

The Court: But you are too late with your objection. He has already answered it.

Q. (By Mr. Gilmore): Now, go ahead and relate the specific instance, as you recall it.

A. Well, the first one that was of importance that I remember was the second year we had them.

The Court: Well, that is too remote now, unless you can show by independent evidence that from the second year that she was in defendant's house something happened and as a result thereof she was hostile right up to the time of bringing the charges, and I think that that is pretty farfetched.

Mr. Ziegler: Well, if the Court please, I would suggest that we go from the first instance, around the date [277] of the bringing of the charge, or at the date of the bringing of the charge, or just prior to it, and then go backwards, and then we can tell whether it is too far.

The Court: Well, in order to avoid blackening the character of this witness, I have got to insist that you show hostility at the time of bringing the charge and then show what the hostility flows from.

Mr. Ziegler: I think that has been established. if the Court please, testified to.

(Testimony of Rolland Lindsey.)

The Court: Well, but he was trying to go back about——

Mr. Ziegler: He was going to the first time, and I suggested that he take the last time and go backward, and then he can stop whenever——

Mr. Gilmore: Well, I will try to comply with the Court's ruling.

Q. (By Mr. Gilmore): Now, shortly prior to the bringing of these charges and while this hostile condition existed, was there something that indicated to you or do you know of something on Loretta's part whereby she planned or schemed to leave her parental home, to leave the home of you and Mrs. Lindsey, to leave and to go away to live with somebody else, and who that was, if you know; do you know of such an instance? A. Yes.

Q. Will you tell us about when it was with reference to the [278] charge that she made against you, and then what it was?

A. Well, she has always wanted to go to Betty Kohler's. That was her stepmother that had her before we had her, who is my wife's brother's wife. She has always told me that she was going to leave home when she was eighteen. She always said that. And about three weeks before or two weeks—I am not too positive of the time—but it was near the time, just before she accused me of this. Neither one of them had any respect for their mother. They never have shown it.

Mr. Munson: I object to that, your Honor.

(Testimony of Rolland Lindsey.)

Mr' Ziegler: That is part of the hostility, I think.

The Court: I don't think it is.

Mr. Ziegler: Showing what he did in conjunction with the attitude toward the mother.

The Court: Why, the threat, if you can call it a threat, of a girl to leave home when she is eighteen, how that could constitute hostility, I can't see.

Mr. Gilmore: But the threat continued, we are going to try to show, your Honor.

The Court: But it isn't anything wrong in itself. A girl has a right to say she will leave home when she is eighteen. There is nothing wrong about that.

Mr. Gilmore: It was just part of her defiant attitude, her hostile attitude, just one instance, that is, the [279] threat to go to some other home.

Mr. Munson: Well, your Honor, I also object to any statement by this witness as to Robert or Loretta's attitude or feeling toward, of hostility or whatever he tried to show, toward Mrs. Lindsey as being immaterial.

The Court: Yes; anything like that is immaterial.

Q. (By Mr. Gilmore): Do you know of any instances shortly before she charged you or any evidence that exists that she had her suitcases packed and that she had money prepared to provide for her going away from your home?

Mr. Munson: Objected to as immaterial, your Honor.

Mr. Gilmore: It shows her ability to carry out

(Testimony of Rolland Lindsey.)

the threats, that they aren't idle and they are real.

The Court: But the difficulty with them is, as I said before, that the wish to leave home is certainly not necessarily indicative of hostility. I can't see how it could be indicative of hostility. She may be dissatisfied and discontented, but that doesn't mean that she is hostile to where she would go out and accuse somebody.

Q. (By Mr. Gilmore): Well, anyway, this feeling, Mr. Lindsey, existed at the time the charges were made against you and prior to that for a number of years? A. That is right.

Q. The same feeling and attitude?

Mr. Munson: Does that mean this feeling about [280] leaving home?

Mr. Gilmore: No. The feeling of hostility toward her adopted father.

Mr. Munson: I haven't heard anything that indicated that yet.

The Court: Well, he answered the question that she was hostile, but he still has to support it by some proof.

Q. (By Mr. Gilmore): All right. Just go on and tell us now in support, that is, going back from the time the charge was made by her against you, and besides the instance that you have related, which continued over a period of time, whether or not there were other instances which resulted in disciplining her by you and what they resulted from?

A. This is just prior to the time also. Now, as

(Testimony of Rolland Lindsey.)

you know, I am a fisherman, and I am out and I am in.

Mr. Munson: I object to this narrative.

A. The people should be explained to why I am not at home all the time. I am only there about——

Mr. Munson: I insist that the witness answer the question.

The Court: You have to answer the question that was asked you.

Mr. Ziegler: I think he was answering the question. He might have made some preliminary statements, but I think he [281] has been answering the question.

The Court: Well, it has got to be a direct answer to the question over the objection of counsel. If counsel doesn't object, why, he can ramble, but otherwise over the objection of counsel it has got to be a direct answer.

Q. (By Mr. Gilmore): Well, explain the incident without the details.

A. When I would come home from my trips and come in the house, the first thing that would happen when I walked in the front door was a big family fight.

Mr. Munson: I object now. Are you referring to a single incident just prior to this charge, or where you referring to numerous instances?

A. Numerous of the same type.

Mr. Munson: I object, your Honor, on the ground that they are immaterial.

(Testimony of Rolland Lindsey.)

A. Well, I can tell each one, which will take more time of the Court.

The Court: Well, do you mean to testify that after each one of these incidents that you have in mind, to which you refer, that Loretta got mad and that she remained mad and hostile and never got over it? Did she ever act friendly toward you after these incidents, or did she remain hostile all the time?

A. Naturally, she didn't remain hostile all the time, but [282] she was mad at me at the time, and, after the wife had told me about these things that she had done and the things that she had taken upstairs or that had disappeared; and then she would tell us that she didn't take them, the wife would ask me to go up and look for those things, and I would go up there and look for them and I would find them about nine-tenths of the time, and the hostility was there. She would be mad, and I would have to restrict them.

The Court: But she would get over it?

A. Well, sometimes it would be a period of time before she would, and it would depend on how serious the thing is that she had done. She stole money from us and as much as a hundred dollars at a time and gave it to the kids at school in twenty-dollar bills, and I had to be real rough that time, as I mean to say, our restrictions were deeper then.

The Court: Well, wouldn't she feel penitent then, just the opposite of hostile?

(Testimony of Rolland Lindsey.)

A. Sometimes she did, and sometimes she didn't.

Mr. Munson: I move that the entire testimony that the defendant just gave be stricken on the ground of immateriality.

Mr. Gilmore: I think it is perfectly proper. It is showing the course now, if the Court please, and it is still [283] preliminary and still on the same subject matter, and I think it is just exactly what the Court contemplated.

The Court: No. It seems that this hostility was not continuous, and it would take continuity to make admissible all these incidents. The evidence of hostility will be limited to acts committed within one month previous to the initiation of these charges. Anything else is too remote under the testimony of the defendant himself that the witness would get over these things.

Q. (By Mr. Gilmore): Tell us, Mr. Lindsey, whether or not you feel down in your heart that the feeling of hostility continued and prevailed, even though outwardly, after this strict discipline that you gave her, whether she on the surface or outwardly might appear friendly, and whether you felt she still had a feeling of hostility for you?

Mr. Munson: I object. This calls for a conclusion.

Mr. Gilmore: He knows. Nobody knows better.

The Court: It isn't how he feels. It is whether there was something that happened from which any body could infer hostility.

(Testimony of Rolland Lindsey.)

Mr. Gilmore: But wouldn't he know too, your Honor. He was there every day with her.

The Court: He would know, but his knowledge, just merely a statement of his knowledge would be a bare, self-serving [284] statement without anything to support it.

Q. (By Mr. Gilmore): Did you, besides the instances that you have mentioned, take her to task, and let's confine it to the time that the Court just ruled on, a month prior to the bringing of the charges against you by Loretta, have to take her to task because of her personal uncleanness and the condition of her room with reference to orderliness?

Mr. Munson: I object——

Q. (By Mr. Gilmore): Don't answer now until the objection is ruled on.

Mr. Munson: I object to the form of that question and the substance of it.

The Court: Well, I just don't see how any child would be hostile because she is asked to clean up, but, if——

Mr. Gilmore: This is an unusual—excuse me, your Honor.

The Court: But, if you can follow it up by showing that, as a result of asking her to wash up, she became hostile, why, you can do it, but you will have to show that she became hostile, otherwise it is just cluttering up the record.

Mr. Gilmore: Yes; but this is more than just

(Testimony of Rolland Lindsey.)

washing up, brushing her teeth, or something. There is something else here.

Mr. Munson: Those facts are not in evidence, your [285] Honor. No one has testified to them, except as they are embodied in the question of counsel.

The Court: Well, I think I have made my ruling clear, that the showing of hostility has got to be limited to thirty days before the initiation of the charges and they have got to be acts that would tend to show hostility.

Mr. Gilmore: Well, I think I can, your Honor. I am not trying to evade the Court's ruling. I am sure I understand it, and I am sure, and I submit to your Honor, that there are extraordinary conditions that don't exist under usual and normal circumstances with reference to the thing that I am about to bring out.

The Court: Well, it might be that they are extraordinary, but that isn't the question here, whether these acts are extraordinary, but whether Loretta Lindsey became hostile and continued in that hostility and the hostility was sufficient to constitute a motive for bringing these charges.

Mr. Gilmore: Well, maybe I am putting the cart before the horse again. I know that they resulted in hostility, and now I am trying to show the things that caused the hostility.

The Court: Well, but it isn't enough that you know it. This witness has got to show it.

Mr. Gilmore: All right.

Mr. Ziegler: I would like to be permitted to be

(Testimony of Rolland Lindsey.)

[286] heard, if the Court please. After all, isn't it a question for the jury to decide from these acts that he testifies to or whether it can be inferred from those acts and what occurred there was hostility.

The Court: But that isn't the problem. The problem here is to get facts before the jury that would have some value in that respect. The fact that you want the jury to conclude something doesn't open the gate to everything.

Mr. Ziegler: Well, I think it is a question for the jury to infer whether the acts were such as to create hostility.

The Court: But it is the province of the Court to first determine whether the evidence is relevant and competent for that purpose. I have already ruled that, in view of the complexion that this particular testimony has taken, it will be limited to thirty days previous to the initiation of the charges and that incidents, of the kind from which it would be reasonable to infer hostility, only may be testified to.

Q. (By Mr. Gilmore): Having the Court's ruling as to the time limitation in mind now, do you feel or do you know whether or not she was hostile to you as a result of your having to take her to task with reference to the condition of her room and her personal cleanliness? A. I do.

Q. All right. [287]

The Court: Now, the next question is—how do you know it? How did she show it?

(Testimony of Rolland Lindsey.)

A. Well, your Honor, now I want to answer these questions right without bothering the Court, and is it permissible for me to tell what is in that room and what I did about it?

The Court: I am asking you the question now. How do you know that she was hostile as a result of that particular act of correction or discipline?

A. I just don't understand the question in that manner.

Mr. Ziegler: In other words, how did she act toward you after you did these things? How did she act toward you? Was she mad?

Mr. Gilmore: Her reaction.

A. Well, certainly, she was mad. Every time I corrected her she got mad.

The Court: But she also got over it; is that it?

A. There were periods of time that she—in the last—you allow me a month, and there was a greater difference than there had been before in her actions. She wasn't—I don't know—she didn't answer me in the same manner. She didn't answer her mother in the same manner. She kept getting more hostile in her answers and her manners.

The Court: That is in the month before these charges were brought? [288]

A. Yes, sir; that is in the month before. I can't go farther back than that, so that is what I am trying to do now. At one time during this month before, she had talked in a very bad manner to her mother in the kitchen one evening while she was doing dishes, and it was as bad a nature that I

(Testimony of Rolland Lindsey.)

slapped her, which I did very seldom. If I can only go back a month, that is the only time within the month that I had ever touched her.

Mr. Ziegler: Well, was she mad at you on account of the slapping?

A. Certainly she was mad at me.

The Court: Then, as I understand it, your testimony is that she was hostile to you, and the hostility was not due to what you did to her that she testified you did but to acts of correction; is that it?

A. That is right, sir.

Q. (By Mr. Gilmore): And did that feeling, the hostile feeling prevail? Did it continue? Did she continue to hold you in contempt, and, defiant, was she defiant of your parental authority?

Mr. Munson: Objected to as leading, your Honor.

Mr. Gilmore: I don't know how it can be leading. The answer to the question——

The Court: You can ask whether she was hostile from the time that this incident occurred of slapping her in [289] the kitchen up to the time of the initiation of the charge.

A. You ask me that question? Yes, she was.

Q. (By Mr. Gilmore): She was?

The Court: Well, how did she show that? How did she show that she was hostile continually after you slapped her that time?

A. By her actions, by the way she acted around home towards me when I was there. Of course I was there very little, sir. I have a logging camp and I was in camp most of the time, but, her atti-

(Testimony of Rolland Lindsey.)

tude when I came home, I knew there was something wrong but I didn't know what it was. She had a different attitude towards me for the last month that we were there, and in fact before then but I can't say those things, you said.

Q. (By Mr. Gilmore): Would you say that she was generally and continuously defiant of you?

A. She was.

Q. And of your parental authority?

A. She was.

Q. Within the same time limitation now, Mr. Lindsay, did she, was she hostile towards you over your bringing her to task about her personal uncleanliness and the condition of her room with reference to her clothes up there within the time limit?

Mr. Munson: Your Honor, I object to these leading [290] questions. All the witness is doing is saying yes and no.

The Court: Yes; this last question is leading. You can ask if there was some further incident.

Q. (By Mr. Gilmore): Were there some further instances, Mr. Lindsey, within the time limitation, that is, within a month prior to bringing the charges, other than what you have mentioned, that is, about the way she spoke to her mother and threats about running away from home; were there other instances?

A. Well, there were instances of the things that she left in her room that I had found up there and——

(Testimony of Rolland Lindsey.)

Q. Did those things that you are about to tell about result in your taking her to task about that situation?

A. They certainly did. I found her night clothes with blood spots that big on them. I found her pads, that a woman uses——

Mr. Munson: I object to this, your Honor, as going into——

The Court: Well, the details of it are not so material. The question is whether, as a result of what you did to her because you found this condition, you created hostility.

A. I certainly did.

The Court: Well, what did you do as a result of the condition you say you found? [291]

A. In the way of correcting her, you mean?

The Court: Whatever you attribute the hostility to.

A. I spoke to them and I talked to them for hours at the table, at different times, not an hour at a time, but, when we would be at the dinner table in the evening, I talked and talked to both of them, and I talked to her about this at the time that I found them upstairs, and I asked her what, well, the conditions, how a girl could let herself go like that, and she was getting bigger all the time and ought to clean herself up, and she was getting to be a woman and that those things she just had to stop doing, and I got after her about it. I never did hit her about it, sir; I never slapped her about those things; but we did restrict her from dances

(Testimony of Rolland Lindsey.)

at the church or shows or anything that would cause her to feel that she was punished for it, and she would never admit that it was wrong or anything of that nature. She would just stand there and look at me, and that is the way I——

The Court: Well, but how did she show her hostility—by not saying anything?

A. No, not by not saying anything; but the way she looked at me, is one way, and disregarding my orders as to what she was to do.

The Court: Well, then do you mean to say that she showed her hostility by the way she looked at you? [292]

A. It certainly was one way.

The Court: Well, I wondered whether——

A. In other words, I mean that it was a very mean look, and it was just as much as to say “What are you going to do about it?” That is the way she would look at me and the way she always looked at me, or he did when I tried to correct him.

Q. (By Mr. Gilmore): Well, it was just an outward manifestation of defiance to you, was it?

A. It certainly was.

Q. And did her disobedience continue?

Mr. Munson: I object to it as leading, your Honor.

Q. (By Mr. Gilmore): Or did she acquire a respect for you because of this discipline?

A. I don't know how to answer that, sir.

Q. I think you testified previously that this defiant attitude continued, and I want to know if that is still your answer.

(Testimony of Rolland Lindsey.)

A. That is still my answer, absolutely.

Q. Are there other instances along the lines, and within the time limitation, that we are talking about that you can tell us?

A. No, sir; not in that length of time, I can't tell it.

Q. Besides a general feeling?

A. Just a general feeling, because in that month that he [293] allows me I think I was in probably two days. As I say, I have a camp; I am not at home.

Q. Where do you live in Ketchikan?

A. On Woodland Avenue, 1067 Woodland Avenue.

Q. And that is your own home?

A. It is my own home.

Q. What size home is it? How many rooms in it?

A. There are four unfinished rooms on the main floor—four finished rooms on the main floor; I had in mind that the upstairs is not finished and when the upstairs is finished there will be four rooms up there; and then I have a large cement basement.

Q. Now, Mr. Lindsey, could you draw a sketch of the floor plan on this board, if you were asked to, the floor plan of your house?

A. I don't know how good it will be but I could do it and I believe they would understand.

Q. Will you step down here, and we will pull out this board a little bit.

Mr. Ziegler: If the Court please, if we had a little more time—what I have in mind is this, that

(Testimony of Rolland Lindsey.)

between now and morning he could take the time to draw this and wouldn't take up the time of the Court right now. He would have to make it very hastily now.

The Court: That isn't going to give us more time [294] tomorrow. I was about to inquire if there is any objection to going on to 5:30, otherwise we are going to run into Thanksgiving with this case.

Mr. Ziegler: Well, if the Court wishes it that way, we are in no position to object to it, naturally. If that is the Court's desire, we will have to do it.

The Court: Well, I don't want the jury out over Thanksgiving, and I am sure the jury doesn't want to be out over Thanksgiving, and Friday morning I have got the Madsen case set with about fifteen new jurors coming in.

Mr. Ziegler: Well, I don't think any time will be lost by this. I would rather have this done now and start in at 9:30 in the morning, Your Honor, and that way I think we will save time for the Court.

The Court: I think we better go on for another half-hour unless some juror will be greatly inconvenienced.

Q. (By Mr. Gilmore): Go ahead then.

The Court: We will go on until 5:30.

A. (Stepping down to the blackboard and drawing upon it) This is the front entrance to my home. The steps lead up this way, out to the gate, and this is the front porch, and then there is a door that leads

(Testimony of Rolland Lindsey.)

into the front room. I can't draw one of these houses the way an architect can, but I will do what I can. Now, this will be the bottom floor of the home, and this is the—that [295] is the best I can do—this is the front room, which is approximately 15 by 24. This is the kitchen, which is approximately 13 by 15. This is the bathroom, which is approximately 6 by 9. This is the entrance and where the stairs go up here and change and go up this way. This is the master bedroom where we sleep, a closet of that nature, and a door here, and this is the other bedroom, which is small. Shall I erase this and——

Mr. Ziegler: Leave that there, and put the other down below that.

Q. (By Mr. Gilmore): And indicate the stairway where it goes upstairs.

A. Here is where it goes up; come in this door and go upstairs. If you can see this, this is where the stairs come up, right here. This was Robert's room. This is all unfinished. This is Loretta's room—closets—the doors are not on, just openings in these rooms. This one, this closet has no door, but these three do have, and, as I said, this is not finished, but it was all wired.

The Court: Well, we don't need to go into those details. He has the rooms shown on there now. That is all that is relevant.

Q. (By Mr. Gilmore): Are there doors to the bedrooms there ?

A. Robert's is here, and Loretta's is here, al-

(Testimony of Rolland Lindsey.)

though I never [296] did have a door that I hung on this bedroom. Loretta's room had no door, but Bobby's has.

Mr. Munson: Where is the stairway on the second floor?

A. The stairway comes up right up here, as such.

Mr. Munson: I mean, where does it cut into the second floor?

A. Right in front of this closet. This should be flat, and walk upstairs and enter this part of the house, and this door that is here has a crack approximately that wide on each side of it that doesn't have any filling. It has never been finished.

Q. (By Mr. Gilmore): Now, on the rooms on the main floor, Mr. Lindsey, just mark them "BR" for bedroom on the right. Is that your bedroom—"BR"? And another bedroom, and kitchen, and living—front room.

A. This is the bedroom, and this is a bedroom, and closets.

Q. And the stairway leading up from the first floor to the second floor.

The Court: I think there is only one stairway. He doesn't have to mark that.

Q. All right. You may resume the stand.

Mr. O'Connor: May we ask one more question before he goes up? What portion of the downstairs is covered by the upstairs now? Would you draw a line across on your lower [297] floor plan

(Testimony of Rolland Lindsey.)

to show where the upstairs is in relation to the downstairs?

A. It is just the same size.

Mr. Munson: Then how could the stairway be outside on the——

A. It isn't outside. This—I am not an architect. This goes in through here, as I have explained, into this, into this part of the house. The wall is here. This goes in and goes upstairs, and I should have, I guess, put it this way. That would be better. There is no outside entrance on this side of the home.

Mr. Munson: Then the stairway cuts into the floor at some point away from the wall?

A. That is true; right next to Robert's room.

Q. (By Mr. Gilmore): You may resume the stand; will you please?

A. (Resumed the witness stand.)

Q. What year did you and your wife adopt Loretta?

The Court: There is no dispute about that either. It is in evidence.

Mr. Munson: He already testified to that.

The Court: Yes.

Q. (By Mr. Gilmore): Well, was your house this way when Loretta was adopted?

A. No. [298]

Q. It was not?

A. It was not.

Q. Well, where did Loretta sleep prior to the reconstruction of your house?

No. 14739

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Court of Appeals
for the Ninth Circuit

ROLLAND LINDSEY, Appellant,
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Transcript of Record

In Two Volumes
VOLUME II.
(Pages 273 to 530, inclusive.)

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First Division

PAUL P. OFFEN, CLERK

JUL 11 1955

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(Testimony of Rolland Lindsey.)

Mr. Munson: I object on the ground of immateriality.

The Court: I think it is immaterial. The only thing that would be material is where she slept when she started sleeping upstairs, under the indictment.

Mr. Ziegler: If the Court please, maybe I am all wrong about this, but my understanding of Loretta's testimony is that Loretta claims that these things went on from the time she was seven years on, and it is material in that respect to see if they were all living downstairs there where they would all be together and whether these things did occur. Now, the jury might feel that——

The Court: Well, if that is the testimony, why, of course you may go into the location of the room in which Loretta slept before she moved upstairs.

Q. (By Mr. Gilmore): Tell us about where Loretta slept and what the house was like before this present situation came into being.

A. The house is twenty-four feet wide now, and we lengthened——

The Court: Just tell where she slept, and then we will get along here a little faster.

A. She slept in the entrance now to where we go upstairs. [299] That was a small bedroom about 6 by 9, and Bob slept in the same bedroom. The wife and I slept in the little bedroom off the front, and the house was eighteen feet in width at that time.

Q. All on the same floor?

A. All on the same floor.

(Testimony of Rolland Lindsey.)

Q. And adjacent to each other **there?**

A. That is right.

Q. And when did you rebuild your house so as to provide these additional rooms?

A. In 1950, in the fall.

Q. Do you remember that distinctly?

A. I am pretty sure it was then.

Q. Was there anything that prompted you particularly in providing additional space and private bedrooms? A. My main object was——

The Court: I don't know how that could be material.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred:

Mr. Ziegler: If the Court please, the purpose for this testimony is to show that up until a pretty mature age that the boy and this girl slept in the same room.

Mr. Munson: I think that is highly prejudicial.

Mr. Ziegler: Well, he is charged with having caused [300] her condition. If we can show circumstances from which it would be inferred somebody else——

Mr. Munson: He was eleven.

The Court: I can't pay attention to you both at the same time. The question, as stated, was what led him to build on these other rooms.

Mr. Ziegler: And the children getting so old and living in the same room, that he deemed it advisable for their protection.

(Testimony of Rolland Lindsey.)

The Court: I don't know how that could be material. My heavens.

Mr. Ziegler: I think there is testimony showing that there was a situation existing and occurrences which required this kind of an action.

Mr. Munson: Could I interject a word?

The Court: No. I have heard enough. I don't want to hear any of that. It is just cluttering up the record and taking time.

Whereupon respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:

Q. (By Mr. Gilmore): Now, were you in Ketchikan, Mr. Lindsey, at the time shortly prior to last Easter when the charge was made, that you have heard testified to, of improper acts, against you by Loretta? [301]

A. Not to the authorities. You mean before she went? I was.

Q. And I am talking about the time when Loretta—the testimony was that Loretta made this charge to her grandmother and then came over to your house, to your home, and repeated the charge to your wife? A. Yes.

Q. You were in Ketchikan? Were you present then?

A. No, I wasn't in Ketchikan at that moment.

Q. I see. Where were you at the time.

A. I was in my logging camp.

(Testimony of Rolland Lindsey.)

Q. And when following that report did you come to Ketchikan?

A. I came to Ketchikan on a Friday night, I believe.

Q. Well, just how soon—— A. No.

Q. Well, how long after that report now?

A. It was on a Saturday night, and it was just two or three days; I am not sure just how long.

Q. Now, when you came to Ketchikan, did you learn that a report had been made against you, a charge of some kind, an allegation, by Loretta?

A. My wife told me that Saturday night about two o'clock.

Q. Had any report been made to the authorities or any official action been taken that you know of? A. No; not that I know of.

Q. And it was about two o'clock in the morning. Was that [302] before you retired or upon retiring that day? A. We had already retired.

Q. What was done or what did you do following the hearing of that report?

A. The next morning I called up Mrs. Pawsey's home.

Q. Don't say what you said but tell us what you did.

A. I called up Mrs. Pawsey's home and found out that Loretta and Mrs. Pawsey were over in Metlakatla. I had her uncle, Mrs. Pawsey's son, Patrick, come to the home and to our house, and I told him that I had my boom out there. It was bad weather. It was anchored in a very bad place, and

(Testimony of Rolland Lindsey.)

that I couldn't leave it there, and I had to go right back, either that night or early in the morning to get my boom, and there was three months work in it. At that time I didn't think it was such an important thing because these kids had run away numerous times and accused us of numerous things, although they didn't ever accuse me of anything before, and it was always their mother that they accused.

Q. When you mentioned running away, I gather then that Loretta was not at your home when you got home from your camp?

A. No, she wasn't home. And I went out or I had Mr. Pawsey come up and I told him that, if he could, to have the grandmother keep the children at home and tell them not to [303] tell this around the streets and that, when I got in from my boom, which would be three or four days, which I figured it would be, we would all get together and get this thing straightened up.

Q. In the light of your having heard about this statement that Loretta made concerning you, why did you go out of town then without straightening out the situation or attempting to?

A. I believe I have already stated that, haven't I?

The Court: Well, I don't know that you have or not, but I don't know how it would be material.

Q. (By Mr. Gilmore): Well, were you concerned about the statement particularly, Mr. Lindsey?

(Testimony of Rolland Lindsey.)

Q. And when following that report did you come to Ketchikan?

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(Testimony of Rolland Lindsey.)

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A. I believe I have already stated that, haven't I?

The Court: Well, I don't know that you have or not, but I don't know how it would be material.

Q. (By Mr. Gilmore): Well, were you concerned about the statement particularly, Mr. Lindsey?

(Testimony of Rolland Lindsey.)

A. Not greatly. I felt that we would straighten it out when I got home.

Q. And when did you return then again?

A. The next Saturday, I believe; Saturday morning.

Q. And did you go to your home at that time after you got back?

A. No, I didn't. I hit Ketchikan about noon with the boom, but I didn't—I took it on through——

The Court: Just answer the question, otherwise we will never get through with this case.

Q. (By Mr. Gilmore): Well, now, tell me, Mr. Lindsey, were you served with a warrant that day or upon your return [304] to Ketchikan from that trip? A. I was.

Q. And where were you when that warrant was served?

A. I was in the office of the United States Marshal.

Q. Did the Marshal see you before that?

A. He did.

Q. And where was that?

Mr. Munson: I object to this, your Honor.

The Court: Objection sustained. We can't spend time here tracing this person's movements and actions ever since.

Q. (By Mr. Gilmore): Now, you heard Loretta testify at the preliminary hearing in the Commissioner's Court, did you, Mr. Lindsey?

A. I did.

Q. Did she make any statements at that pre-

(Testimony of Rolland Lindsey.)

liminary hearing that were inconsistent with her testimony on the witness stand here yesterday?

Mr. Munson: I object. It is impeachment again without foundation, your Honor.

The Court: Yes; and it calls for the conclusion of the witness.

Mr. Gilmore: Well, he certainly knows. I mean, it is just the bare statement.

The Court: You are asking him to express an opinion [305] upon her testimony, the testimony she gave or didn't give. Now, it is up to the jury to draw any inference or opinion, except in the case of an expert witness, and this man is not an expert witness.

Mr. Gilmore: Very well, your Honor.

Q. (By Mr. Gilmore): Now, when is the first time, Mr. Lindsey, that you ever heard in your life of any complaint by Loretta against you for any improper acts that you were supposed to have committed toward her?

A. When I came home the first time and they told me that she had run away.

Q. Had she ever mentioned anything to you or to your wife before that, that you know of?

A. She had never mentioned anything to me nor no one else to my knowledge.

Q. When is the first time you ever heard her directly make any assertion about improper conduct?

A. At the preliminary hearing.

Q. Now, do you remember the day that she came

(Testimony of Rolland Lindsey.)

out to your home between nine and ten one morning after her return from Wrangell? A. I do.

Q. You were home then? A. I was.

Q. Who else was home? [306]

A. My wife and the babies.

Q. And what did she say when she got there?

Mr. Munson: I object, your Honor. This is about the fourth witness to testify to this same incident and the same set-up.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Well, what did you do, what did you do following or what was done following her coming to your home? I will withdraw that. I will ask you this question, Mr. Lindsey. Do you know why she came out to your home that morning?

Mr. Ziegler: Did she tell you why?

A. She told me why.

Q. (By Mr. Gilmore): So, you know why. Why did she come to your home that morning?

A. She told me that she came home to tell the truth and drop these charges against me.

Q. And what did you do after hearing that?

A. I called my attorney and asked him what the legal procedure would be in the case.

Q. Following that, what did you do?

A. On my attorney's advice I took her down to his office, and she made out this affidavit we have, and the affidavit states that I didn't do any of this.

Q. Did you go directly from your house down to your attorney's [307] office? A. We did.

(Testimony of Rolland Lindsey.)

Q. Did you any place en route or stop any place en route? A. We did not.

Q. Did you discuss the matter that she was going to tell about, when she got there, on your way down? A. We did not.

Q. Did you have any conversation with her about how she would explain the results of her physical condition? A. I did not.

Q. Did you tell her that she should say, at that time and that place, that she could say that it was caused by a banana that she put in there?

A. I did not.

Q. How long did it take you to go from your home down to Mr. Zeigler's office that morning, about? A. Between five and ten minutes.

Q. Who did you see when you got there?

Mr. Munson: I object, your Honor.

The Court: I don't think there is any dispute about who was there.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Now, after you got there, what did Loretta do and say.

A. She told Mr. Ziegler that she had came to tell the truth [308] and drop the charges against her daddy and that she wanted to sign papers and tell him about it and sign papers to that effect.

Q. What did she say about the original charges that she had made against you?

A. That they weren't true.

Q. Did she give any explanation as to why she made such a charge against you in the first place?

(Testimony of Rolland Lindsey.)

Mr. Munson: I object on the ground that no foundation has been laid for this question with the complaining witness, your Honor.

The Court: The question was, did she explain why she brought them?

Mr. Gilmore: Yes, your Honor; in the first instance, if she did.

The Court: Well, that calls for a conversation again that apparently is not in the statement.

Mr. Gilmore: Well, it wouldn't necessarily be contrary to the witness'—

The Court: But the witness has got to have been given the opportunity to deny it or admit it, and, if that isn't done, why, this witness can't be permitted to impeach her.

Mr. Ziegler: Well, if the Court please, as I understand the Court's ruling, we are perfectly willing to have [309] Loretta called back and give her a chance to deny or admit it, but I understand the Court won't permit it. Now, we offered to have that done and are willing to have it done.

The Court: You mean, you want her called back on the stand.

Mr. Ziegler: That is right.

The Court: And I ruled on that a while ago when I said that, if it were due to something that you didn't know of at the time or if it had been overlooked as a result of inadvertence or something, that would be permitted but not if it was merely due to ignorance of the rule, and nothing further

(Testimony of Rolland Lindsey.)

was said, so I assumed that those conditions couldn't be met.

Q. (By Mr. Gilmore): Now, I ask you, Mr. Lindsey, whether or not up in Mr. Zeigler's office that morning Loretta didn't make a complete, voluntary retraction of the charge that she had previously made against you? A. She did.

Q. Did she state that she had lied previously when she made the charge against you?

A. She did.

Q. Did you use any influence or duress or coercion on her to get her to make that statement?

A. I did not; none whatsoever.

Q. Do you think by your relationship alone, of being her adopted father, that she was influenced into making that [310] statement?

Mr. Munson: I object. He is invading the province of the jury. It is an inference for the jury to determine, your Honor.

The Court: Yes. You are calling for an inference now on his part.

Mr. Gilmore: Very well, we will leave that to the jury to decide, and I will be satisfied with that.

Q. (By Mr. Gilmore): Now, I will ask you this. Did Loretta write to you and your wife from Wrangell before she came down here?

The Court: That is all undisputed in the evidence.

Mr. Ziegler: That is preliminary, your Honor.

The Court: Well, go to the next question. Never mind the preliminary question when what

(Testimony of Rolland Lindsey.)

would be elicited by the preliminary question is already in evidence.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Was Loretta coming down here to do the very thing that she did, before she did come down here? A. Absolutely.

Mr. Munson: I object. It calls for a conclusion of the witness, your Honor.

The Court: Yes. Objection sustained.

Mr. Gilmore: If he knows; but it is based on knowledge, your Honor. [311]

The Court: Why, you are asking him for what was, practically, in her mind when she left Wrangell.

Mr. Gilmore: What, your Honor?

The Court: You are asking him as to what was in her mind when she left Wrangell.

Mr. Gilmore: If he knows.

The Court: Well, how could he know?

Mr. Gilmore: Through the letter he got the next day.

The Court: Well, then, you can ask him whether he knows from the letter, and, if you ask him that, then it is for the jury to draw the inference.

Q. (By Mr. Gilmore): Had you received that letter the morning that Loretta came out to your house? A. No, sir.

Q. Did she mention having written to you?

A. Not to me, but to my wife.

Q. I see. Do you know when this letter was post-

(Testimony of Rolland Lindsey.)

marked with reference to the date that she left Wrangell?

A. Well, I believe it was on a Saturday; I am not sure; or Monday, was the day after she had written it.

Q. And when did you receive the letter in relation to the time that Loretta came out to your house?

A. It was either that afternoon on the afternoon mail delivery or it was the next day; I am not sure which; I don't remember just which day it was.

Q. Well, now, the testimony has been—I don't know whether you remember the exact day—but it was the 25th of August that she made this statement——

A. Well, that is the exact day. I know it is.

Q. That is the day. Now, on this exhibit the cancellation of the Wrangell Post Office shows August 23rd——

Mr. Munson: Are we arguing this, your Honor?

The Court: It is already in evidence, and the postmark is in evidence, so I don't know why we should——

Mr. Gilmore: Well, but, as yet, this——

The Court: ——kill a stuffed tiger or something of that kind.

Q. (By Mr. Gilmore): Did Loretta, when she was making this retraction of the charges against you, tell you why she had made the charges against you up in the lawyer's office?

Mr. Munson: I object on the same ground, that

(Testimony of Rolland Lindsey.)

there was no foundation laid for any conversation between this defendant and Loretta concerning——

The Court: She wasn't asked anything of a conversation of that kind. Objection sustained.

Mr. Gilmore: If the Court please, and with leave of the Court, I would like to read one of the letters, which is part of the Defendant's Exhibit A, at this time, and of course the letter that we are talking about.

The Court: Very well. [313]

Mr. Gilmore: This is the letter dated "August 22, 54. 10:15 p.m." It reads: "Dear Mom, I know just how mad you are at me. But I hope you will forgive me. I hope you can do it. I know how hard it will be. When you made me fold clothes I got real mad. I right now I would beg to do it. I hope you will forgive me for what I have done. You and Dad got me when I was a little bum, and gave me a real nice home. So what did I do. Please forgive me. Love, your daughter, Loretta."

This is another letter in the Exhibit A, dated August 22nd: "Dear Mom and Dad, I beg for forgiveness right now. I have only thought of myself in this matter. Dad, I hope you will forgive me. I know I made a mess of things for you and Mom and Randy and Janice and Pat. I'm going to drop the charges that I made against you, Dad. That will mean that you will be back at your house. I guess family love is a thing just one person can't break. I guess Mom was right when she said that I was jumping out of the frying pan into the fire. I hope

(Testimony of Rolland Lindsey.)

bygones are bygones. I know that you and Mom were doing what you thought was right for me. I hope when I come back home I can make up for what I did. Love, your daughter, Loretta."

August 22, 10:00 p.m.: "Dear Dad, I hope you forgive me. I know it is a lot to forgive. But, my love for you and Mom and kids is too much to forget too. I have changed a [314] lot in many ways. I will do as I'm told to do, when I come back home to my family. Love, your daughter, Loretta. Over. Oh, yes. I'm dropping the charges that I made against you."

Dated August 22: "Dear Randy, and Janice, and Pat: I know you won't be able to read this. But Mommy will read it to you. I would give my right arm to see you guys. I hope you will forgive me for what I have done to you. I will make it up to you guys too. Love, your Sis, Retta."

The Court: Now, is there any objection on anybody's part to commencing at 9:30 tomorrow morning?

Mr. Munson: No objection on the Government's part, your Honor.

The Court: Any objection on the jury's part?

(No response.)

Whereupon Court adjourned until 9:30 o'clock a.m., November 24, 1954, reconvening as per adjournment, with all parties present as heretofore, and the jury all present in the box; the defendant Rolland Lindsey resumed the witness stand, and the

(Testimony of Rolland Lindsey.)

Direct Testimony by Mr. Gilmore was continued as follows:

The Court: In connection with the offer of the affidavit into evidence——

Mr. Ziegler: If the Court please, it is not an affidavit. It is just a sworn statement.

The Court: I have concluded that since the substance [315] of the statement is already in evidence that the statement itself may be admitted.

Mr. Gilmore: May be proceed, your Honor?

The Court: Yes; you may proceed.

Mr. Gilmore: We offer it as evidence, as Defendant's Exhibit B.

Clerk of Court: It will be so marked.

Q. (By Mr. Gilmore): Now, Rollie, I wonder if since yesterday afternoon when you got through testifying at 5:00 o'clock or 5:30 last evening, if you were able to recall another specific instance which led to a reprimand followed by a strong, defiant feeling of animosity and an expression of it on the part of Loretta? A. I do.

Q. Within the time limitation, that is, within the thirty days preceding the bringing of the charges? A. I do.

Q. Will you tell the jury about it, please?

A. We were at the dinner table and——

Q. Try to set the time.

A. It was approximately ten days or two weeks before she ran away, and Mrs. Lindsey had been having trouble with them so she decided to send Loretta to Haines and to send Bobby to Sitka, and

(Testimony of Rolland Lindsey.)

Loretta was very mad about this, and Bob said he would run away from home before he would go [316] up there, and afterwards they came in the front room to me after dinner, and I told them at that time not to come to me this time for help because I was through protecting them, when Mother was going to send them away, or helping them along as I had done, that, if she decided that they were to go there this fall, they had six months to straighten up and, if they didn't straighten up, that they was going there if that is where she wanted them to go.

Q. Rollie, did you find amongst Loretta's things a letter, also within the time limitation, that indicated that she was going away? A. We did.

Q. And, if I show you this——

The Court: Well, now, was the witness Loretta Lindsey questioned about that?

Mr. Gilmore: Yes, I think she was, about going away, your Honor.

The Court: Well, you just have another incident or example of what the Court has been trying to make plain by its rulings, that here was this conversation related between the defendant and Loretta about being sent away, about which the witness Loretta was not asked. Now, that will mean that the prosecution will have to recall her, all of which produces disorder and confusion. Before a witness may be asked about [317] any conversation that would tend to contradict or impeach a prior witness, the prior witness must have been asked that

(Testimony of Rolland Lindsey.)

when he or she was on the stand, and so we come down to it again in the case of this letter. I don't recall that that letter was ever made the subject of any examination of Loretta Lindsey.

Mr. Gilmore: I see. Well, naturally, your Honor, it was, like following the questions late yesterday afternoon between 5:00 and 5:30, that I intended to have him testify only, that was the animosity and then the reason for it, as to the instance about telling them that she was going to Haines, without relating the conversation.

The Court: Well, that may be. I understand what you intend to do; but, in ruling that acts of the kind which would justify an inference of hostility may be shown, I certainly didn't intend to depart from the rule that, if the act involved is conversation of any kind, there must be a foundation laid for it.

Mr. Gilmore: Well, your Honor, with reference to your previous ruling, I think my co-counsel will agree with me that in this particular instance, although we couldn't yesterday, that it was sheer inadvertence with reference to the omission of the questioning of Loretta with reference to this letter, and at the propitious time we would ask leave of the Court to recall her for further examination with the [318] Court's permission.

Q. (By Mr. Gilmore): Now, if I understood you correctly, Rollie, you testified last night that there was no door. This is Bob's room marked "B". This is Loretta's room over here. Is that correct?

(Testimony of Rolland Lindsey.)

A. That is correct.

Q. And there was no door on Loretta's room?

A. That is right.

Q. Did that situation continue right along?

A. That has been that way since we finished the part of the house when we built it altogether.

Q. Any wall or partition or anything like that between this open space and the doorway that leads in there to Loretta's room? A. No.

Q. Nothing to obstruct the opening into her bedroom there? A. No.

Q. And Bob's bedroom is here, is it not?

A. That is right.

Q. And this is the door into his bedroom?

A. Yes.

Q. He had a door on his room, I believe you testified? A. Yes.

Q. What did you testify as to whether it was finished on the sides? [319]

A. When a door——

The Court: He has already testified to all that. He even showed the space on each side of the door that was left open.

Mr. Gilmore: Yes.

Q. (By Mr. Gilmore): Now, Rollie, you heard Bob Lindsey testify that you went up to, upstairs, and he thought over into Loretta's room several times in the early morning hours. Did you ever do such a thing?

(Testimony of Rolland Lindsey.)

A. I believe he also said it was on weekends, and that would usually mean a Sunday morning. My wife and I went to the lodge usually on Saturday night to the dance. We would get home all the way from 2:00 o'clock to 4:00 o'clock.

Mr. Munson: Your Honor, I object. He is not answering the question.

Mr. Gilmore: Well, that is right.

Q. (By Mr. Gilmore): That is preliminary, Rollie. Just try to kind of answer my question more directly, if you will, please.

A. Ask it again so I can answer it directly; will you please?

Q. Well, I asked you whether or not you recall Bob Lindsey testifying that on several occasions he thought he heard you, he heard you come upstairs and thought he heard you walk over and go into Loretta's room in the wee, early hours of the morning. [320]

A. I never went into her room in the morning, which was very seldom, except later than 7:30 or 8:00 o'clock. That would have been the very earliest.

Q. Do you feel certain about that, Rollie?

A. I do.

Q. Would there be any occasion for your going there prior to the time when she was to get up?

A. Absolutely none.

Q. Did you on occasion go upstairs to wake the kids up? A. I did.

(Testimony of Rolland Lindsey.)

Q. And frequently? A. Yes.

Q. Were they light or heavy sleepers?

A. They were both very heavy sleepers.

Q. Rollie, with reference to the statement that has been introduced, the Defendant's Exhibit B, after the statement was made by Loretta, and she answered these questions up in Mr. Ziegler's office, did you and Loretta leave the office, the law office?

A. We did.

Q. Did you leave together, that is, go together some place, when you left the law office?

A. When we left the law office the first time, I went home, and I am not sure where she went.

Q. Are you sure you didn't go anywhere together? [321] A. That is right.

Mr. Munson: I object, your Honor.

The Court: Is this supposed to be in rebuttal of something?

Mr. Gilmore: No. It is just——

The Court: It is immaterial where they went. It might be material for cross examination, but it certainly is immaterial for direct.

Q. (By Mr. Gilmore): Rollie, after the statement was signed, which was sometime in the afternoon, did you take a copy of this statement down to the United States Marshal's Office?

A. I did.

Q. And on whose instructions was that done?

A. It was on the advice of my attorney, but I felt the authorities should have it at the earliest possible moment.

(Testimony of Rolland Lindsey.)

Q. Now, Rollie, I am going to ask you whether or not there were occasions when you and Loretta were alone together, and, if so, tell us about it. What is the answer, first?

A. Yes; there was numerous times.

Q. All right. Was there ever a time when you harmed or made any advances to Loretta?

A. No; there was not.

Q. Did you ever engage in any immoral act with her? [322]

A. I did not.

Q. At any time? A. Never.

Q. You are charged in this indictment, Rollie, with having on——

Mr. Munson: I object, your Honor. He is well acquainted with the charges in the indictment.

The Court: Well, there are several charges. You have a right to—why don't you just call his attention to the charge you have in mind without reading it at length?

Mr. Gilmore: Yes; I was going to, on these various dates. That is all, your Honor.

Q. (By Mr. Gilmore): ——with having on October 22, 1951—does that date have any significance to you? A. It does.

Mr. Munson: Your Honor, he has already said he has never made any immoral advances on this girl. I don't see what purpose is served by taking specific dates and having him answer the same question six times.

The Court: Well, it seems to me it is a duplication.

(Testimony of Rolland Lindsey.)

Mr. Gilmore: Well, except, your Honor, that it has a tremendous significance to him, these dates. There is something kind of magical about these dates, and he can testify—he just said that there is some significance to this date—he can tell us about; and of course that is the very [323] date that the man is charged with committing this most heinous charge, and here is the allegation of it.

The Court: Well, if he answered, as I think he has, that he has never committed any of these acts that have been testified to by Loretta, I don't know how you can make it any more inclusive than that or any more conclusive, for that matter.

Mr. Gilmore: I see.

Mr. Ziegler: Will the Court permit me to be heard? I think Loretta testified that, she claimed, this happened when the baby was born on October 22, 1951, the first time. Now, then, the defendant certainly, I think—I think the jury would like to know—he should be permitted to explain where he was on that date, because, as I recall the testimony, her testimony was that it happened on the day that his wife was in the hospital.

The Court: Well, certainly, if that is true, but that wasn't the question that was being asked.

Mr. Ziegler: Well, I think that was what it was leading up to.

The Court: In other words, I have ruled here that there is no use of duplicating something that is already in evidence, but from what you say the

(Testimony of Rolland Lindsey.)

purpose of the question that is to be asked is to rebut——

Mr. Ziegler: That is right; to explain where he [324] was and his actions on that particular day.

The Court: Well, so far as it may constitute a rebuttal of the prosecution's testimony, it may be admitted, but the question whether he committed that act on that day has already been answered.

Mr. Gilmore: Yes. I won't repeat that same question.

Q. (By Mr. Gilmore): Tell us about October 22, 1951, and why it was significant to you.

A. The significance of it is that that is when my first baby was born, and I was on my annual hunting trip to Rocky Pass. We ran all that day before and got in town at 11:00 o'clock. It is about a fifteen-hour run or sixteen.

The Court: Well, just eliminate those details and tell when you got into town.

A. At the moment I got in town I found out my wife was in the hospital and I went there and I was there until 9:30 in the morning, and then I went down and had my breakfast with my mother-in-law, and I got home about noon. I had been up about thirty hours, and I slept till 6:00 o'clock, and I went back to the hospital. I was with my wife until 7:00 o'clock when they kicked me out.

Q. Do you recall whether Loretta was home or in the house at that time on that day?

A. Well, she was home at noon hour, but I don't know, I [325] don't remember, I don't recall

(Testimony of Rolland Lindsey.)

whether she was there that afternoon or whether she wasn't. I do remember that it was a school day, and I know that Bob was in school; I am sure of that.

Q. Now, October 23, 1952, does that date have any significance to you, Rollie?

A. Yes, it does.

Q. And why?

A. That is when my second baby was born.

Q. Do you recall that day? A. I do.

Q. Now, just tell us where you were and what you were doing on that day, as you recall it?

A. I was at home, and I don't remember. I just don't remember just exactly what happened except that the second baby was born.

Q. You remember it was the day your baby Janice was born. Now, February 27, 1954, Rollie, I ask you if you remember that day? A. I do.

Q. Anything significant about it?

A. The same thing. My third baby was born on that day.

Q. And where were you?

A. I was here. I was at home.

Q. In Ketchikan? [326] A. Yes.

Q. And did you go to the hospital that day to see your wife? A. I certainly did.

Q. Was Loretta home? Were you and Loretta home alone that day?

A. I just don't remember. I am not sure. I wouldn't say.

Q. Could have been?

(Testimony of Rolland Lindsey.)

A. Could have been. I don't remember. It wasn't——

Q. Do you remember whether or not——

A. It wasn't significant with me then, and it wasn't important.

Q. Now, you heard, I believe it was, Bob, Rollie, testified that on New Years Eve or New Years Day, I am not quite sure which, that you sent him away from home, that your wife was away, and that you and Loretta were together for a considerable period of time. Do you recall any such instance?

A. I don't recall it, but I could have sent him downtown. I just don't remember whether I did or whether I didn't, and, whether the wife went over to her sister-in-law's, I don't know. I don't remember that, whether she did or whether she didn't.

Q. Well, did you send him away for the purpose of being alone with Loretta?

A. I certainly did not. [327]

Q. Did you pull the shades down in the house that night?

A. I don't know. I don't remember. We usually do after dark pull the shades in our front room.

Q. Rollie, would you recognize the handwriting of Loretta? A. I sure would.

Q. You have seen it many times?

A. I have. I have helped her with her school work.

Q. I hand you this card and ask you to look at it carefully and ask you if you can identify the writing on it? A. Yes, I can.

(Testimony of Rolland Lindsey.)

Q. Whose writing is it?

A. It is Loretta's.

Mr. Munson: Your Honor, this is the same card that was objected to before on the grounds of incomprehensibility. I can't read it.

The Court: Yes. I don't see how——

Mr. Gilmore: May I approach the bench for a minute, your Honor? There is one word that I think is the ground for the incomprehensibility. I think he can explain it.

The Court: Well, you may.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred.

Mr. Gilmore: This little card here says in Loretta's handwriting, "No matter what happened with me and [328] Mom, I will always hate her."

The Court: I have already ruled that any hostility toward the mother is immaterial.

Mr. Gilmore: That would be my only grounds. She testified to no hostility—remember—how she loves her.

The Court: Even though it would show hostility, it is immaterial because the mother is not the defendant.

Mr. Gilmore: Except the relationship between the mother and father——

The Court: But the relation between the mother and Loretta is not in issue.

Whereupon respective counsel and the court reporter withdrew from the bench and were again

(Testimony of Rolland Lindsey.)

within hearing of the jury, and the trial proceeded as follows:

Q. (By Mr. Gilmore): Having in mind the same questions that I asked you concerning your acquaintanceship with Loretta's writing, I ask you if you recognize the writing on that card?

A. Yes, I do.

Q. And whose writing is that?

A. Loretta Lindsey's.

Mr. Gilmore: We offer this.

Mr. Munson: I would like to ask counsel, your Honor—the witness Loretta has admitted writing part of this card and denies writing other parts. I would like to have the [329] witness testify as to which part of this writing he recognizes.

Q. (By Mr. Gilmore): I ask you whether you specifically recognize the writing that is in pencil there, enclosed by that circle? A. I do.

Q. And whose writing is it?

A. Loretta's.

Q. How about the writing in pen and ink, do you recognize that writing?

A. It is Loretta Lindsey's.

Mr. Munson: Your Honor, I object to the admissibility of this card simply because it is irrelevant.

The Court: Let's see it. I don't know what it is.

Mr. Munson: Irrelevant and immaterial, and it has no date on it to indicate when it was written, the part that was written by the complaining witness, and it has no probative value whatever.

(Testimony of Rolland Lindsey.)

Mr. Gilmore: Well, we can set a time on it, I am sure.

The Court: What part of it was it that the witness Loretta Lindsey denied was her writing? Is that the part that is in ink?

A. The part that is circled in the middle.

Mr. Gilmore: The part that this witness testifies is her writing, your Honor. [330]

The Court: The objection is sustained because it has no probative value. I don't see how it could possibly prove or disprove or tend to prove or disprove anything in the case. This is not a case in which one of the principal issues is handwriting or the identity of the writer.

Mr. Gilmore: Well, of course, it wasn't introduced for that purpose, for the handwriting, but the contents of it——

The Court: Well, that is what I refer to when I say that it has no probative value. The objection is sustained.

Mr. Ziegler: Will the Court permit me just a minute? In the statement that Loretta made she said the reason she made these charges, your Honor, against Mr. Lindsey was she wanted to get away from home. Now, any evidence indicating that it was part of her plan and was in her mind, we feel is competent evidence.

The Court: Well, I don't know how it tends to prove that. I think it is utterly without any evidentiary value, and that is the ruling of the Court.

Q. (By Mr. Gilmore): Now, you testified about

(Testimony of Rolland Lindsey.)

the conditions in your home and the times and circumstances when you were there and when Loretta could have been there with you alone. You heard Loretta testify, or Bob, rather, or both of them, about one time when you were down on your boat when it was at the New England Fish Company Dock and that you sent Bob uptown, and Loretta was aboard, [331] and you threw the lines loose, started the motor up, threw the lines loose and drifted up the channel—Bob said way up the channel; do you remember any such thing?

A. I remember the time that Bob went after the window glass to the Tongass Trading Company.

Q. Was the ship tied up at New England?

A. We were tied at New England, and I was unloading fish from trolling, but I didn't go out in the middle of the channel, as she stated in the narrows, and turn my motor off and drift. She stated I went out from New England Dock and shut the motor off in the narrows. I never did that in my life.

Q. What would be the likely result with a boat of your type and size if you ran her out in the channel and let her drift, Rollie?

Mr. Munson: I object, your Honor.

The Court: That would seem to call for pure speculation or a guess.

Mr. Gilmore: Well, it is a matter of opinion, your Honor.

The Court: Well, but the jury is entitled to draw that. They are acquainted with the——

(Testimony of Rolland Lindsey.)

Mr. Gilmore: Well, he has the boat, and for fifteen or twenty years he has been plying the waters here. I don't know if they know the currents or what would likely result. [332]

Q. (By Mr. Gilmore): Well, anyway, you never at any time turned your boat loose and drifted out in this channel or any other channel; is that right?

A. The way you ask that, I can't answer it.

The Court: You better eliminate "any other channel."

Q. (By Mr. Gilmore): Well, eliminating "any other channel"; from the New England Dock, and drifted out in the channel with Loretta aboard?

A. I never went out in the channel and shut my engine off and drifted.

The Court: Were you out there with her alone? That is——

A. Yes, I have been, but not in that channel drifting.

The Court: The method of getting out in the channel or the precise location of the boat is immaterial. The only question is whether he was out there where he had an opportunity.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Did you go out from the New England Fish Company, that day she talked about, in the channel with Loretta alone?

A. I don't remember that, but I am not sure.

Q. Now, you said that you were out on the boat one time or in the channel or sometime; tell us about that.

(Testimony of Rolland Lindsey.)

Mr. Munson: I object, your Honor, on the ground that he has gotten away from the incident.

The Court: Yes. Any other incident or time is immaterial here. It is the particular time that was testified to or the particular incident testified to by Loretta Lindsey.

Mr. Ziegler: Get him to tell the only time he was out on the channel with Loretta Lindsey and——

Mr. Munson: The same objection, your Honor.

The Court: I didn't understand what is now proposed to be asked.

Mr. Ziegler: The question is to relate the only time or times he was out on the channel or away from the dock with Loretta alone on the boat; what times they were, and what he did on those occasions; what he was doing.

The Court: Objection sustained. There is only one incident here in evidence.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Now, let's make this perfectly clear. Did you with Loretta alone aboard the boat, with you and Loretta alone aboard the boat, throw the line off and drift out in the channel as she has——

The Court: I have already held that the method of getting out there is immaterial.

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Or were you out in the channel drifting with Loretta alone aboard the boat? [334] A. I was not.

The Court: Were you out there without drift-

(Testimony of Rolland Lindsey.)

ing, so that you were out there in the channel with her alone?

A. I have been out with her many times back and forth from Thomas Basin.

The Court: Well, as I have said before, the manner in which he got out there is immaterial. The precise location of the channel is immaterial. The only question is whether there was that opportunity.

Mr. Gilmore: That is right, but, as I understand it——

The Court: Well, you ask about throwing off the lines, which, of course, is just where we started before I ruled.

Mr. Gilmore: Well, it was for the purpose only of identifying the time, your Honor, that was the main time, at the New England Fish Company, and that incident. That was the purpose of the “lines”.

Mr. Ziegler: Now, if the Court please, I think the witness should be permitted to testify the occasions that Loretta was on this boat with him alone, the circumstances, where it was, and when it was.

The Court: I have already ruled against that. We would be here for a week if I let everything in that has been proposed to be allowed to go in. I have ruled it out. It [335] wouldn't tend to rebut anything that Loretta testified to if it related to any other incident out there in the channel.

Mr. Ziegler: Well, your Honor, isn't this witness permitted to testify——

The Court: I have already ruled, and I don't want to hear any further argument on that ruling.

(Testimony of Rolland Lindsey.)

Q. (By Mr. Gilmore): Now, Rollie, I am going to ask you whether on that occasion, that we are talking about, or at any other time on your boat, whether you ever committed any immoral act on Loretta?

Mr. Munson: I object. He has already answered that question before. He said at no time.

Mr. Gilmore: We are talking about the house.

Mr. Munson: You asked him if he had ever committed an immoral act with her, and he said no.

The Court: Well, in order to make the thing clear, it could be assumed perhaps that in his previous testimony he limited his answer to activities at the house, and now it is limited to any act of that kind on the boat, and he may answer that.

Q. (By Mr. Gilmore): Will you answer it?

A. Will you ask it again?

Q. Did you ever at any time on your boat commit any immoral act on Loretta? A. I did not.

Q. Rollie, I am going to ask you what may appear to be a personal question but it is of importance and material here. Will you tell this Court and jury whether or not you and your wife used contraceptives in the form of condoms or rubbers during your marital life?

Mr. Munson: I object, your Honor. It is immaterial.

Mr. Gilmore: It is preliminary to a question, your Honor. The next question will be very material and connect it up.

The Court: Why don't you go to that question first?

Mr. Gilmore: All right.

Q. (By Mr. Gilmore): Rollie, I will ask you

(Testimony of Rolland Lindsey.)

whether or not you found in your house, and tell us when, if you did, some rubbers sometime shortly before these charges were made by Loretta against you? A. Yes.

Mr. Munson: I object again, your Honor, on the ground of immateriality.

The Court: No. I think that, since there has been testimony here of the prosecuting witness that he used them, I think that he has a right to testify concerning the presence of any such articles in the house.

Mr. Ziegler: And particularly, your Honor, with regard to the can that Bob himself brought there, which has been testified to. [337]

Q. (By Mr. Gilmore): Will you answer that question please, Rollie?

A. You asked me if I found any, and I said, "Yes."

Q. Tell us about when it was you found them please.

A. Oh, it was about two or two and a half weeks before she ran away, both of them ran away.

Q. The last time? A. Yes.

Q. Now, tell us where you found them, Rollie.

A. I found them up in Bobby's closet in his room, and I had a bunch of outboard parts there in a pail, and I went up to get them and I took the pail out. My closet was not finished, and there was lumber and everything in there, and, when I took the pail out, well, I found this box behind, and Bob and Loretta were home at that time. I don't remem-

(Testimony of Rolland Lindsey.)

ber whether the wife was or not, but they were downstairs in the kitchen, and I went down and asked Robert where he had gotten this. He had just been in trouble with the police, and I mentioned to him and told him, "Haven't you been in enough trouble without"——

Q. Don't relate the conversation.

The Court: You are back to a conversation without having asked the witness Bob Lindsey.

Q. (By Mr. Gilmore): You did confront Bob with it?

A. I did, and he didn't answer me. [338]

Q. Now, I ask you whether or not those were your rubbers, that is, yours, your own?

A. They were not.

Q. Did you and Mrs. Lindsey as a matter of course use rubbers? A. Never.

Mr. Munson: Your Honor, I move that this entire line of testimony be stricken on the ground of its irrelevancy. I don't see where it has proved anything.

Mr. Gilmore: It is highly relevant, your Honor. There is testimony in this case that a can of rubbers was brought down by Bob and he said, "Here is the proof of the charges" against his dad.

The Court: I don't know how it could be the same can, because the question that confronts the Court now is whether you can rebut the evidence of Bob Lindsey about finding this can, this empty can, or the container for the condoms, up there on the rafters by testimony that he found one in Bob

(Testimony of Rolland Lindsey.)

Lindsey's room. That is what it is. That is the question.

Mr. Gilmore: Well, if Bob had one, had several up there, as he found, it very logically follows that the can that he brought down, that he proffered there as evidence against him, could have come from the same place.

Mr. Munson: I don't see where that follows, your Honor. I think it is—— [339]

The Court: It is very tenuous.

Mr. Ziegler: Well, if the Court please, as I recall it, the prosecuting witness herself said that he used these rubbers when he committed these various acts.

Mr. Munson: It has nothing to do with this question now.

The Court: He has already denied using anything of that kind, so the finding of a can in somebody else's room would not tend to prove or disprove what Loretta Lindsey testified.

Mr. Ziegler: As I understand the question, he was asked whether he or his wife ever used them or had them in the house. Isn't that the question?

Mr. Gilmore: That is right. He said he and his wife never used them, so it leads to a pretty logical conclusion.

Mr. Munson: Your Honor, I renew my motion. I think that the testimony is irrelevant.

The Court: I think the finding of this can in Bob's room is irrelevant, but it is immaterial also, and so it is perhaps harmless, and there is no use

(Testimony of Rolland Lindsey.)

of striking it, except that counsel will not of course be able to argue it.

Mr. Munson: Well, your Honor, it is irrelevant and immaterial, but it is also highly prejudicial. In fact, I believe the whole purpose of bringing out that testimony was [340] to——

The Court: Well, prejudicial to whom?

Mr. Munson: To the witness Robert Lindsey. It is immaterial evidence which casts an unfavorable light on him, and I think it should be stricken.

The Court: Well, I am inclined to think that that is so.

Mr. Gilmore: Except, your Honor, there is an attempted point that should be seriously considered, and that is that Bob went up to his room and brought down from his room something of the exact nature——

The Court: He didn't say he brought it down from his room.

Mr. Gilmore: From upstairs, your Honor. I beg your pardon.

The Court: Didn't he describe it as in Loretta's room?

Mr. Munson: I believe, your Honor, he said in the rafters some place between his bedroom and Loretta's room, is my recollection of it.

Mr. Gilmore: But then of course there is the other testimony of Mrs. Lindsey, who said she didn't hear him in Loretta's room, and that in all probability it could be logically concluded that he went up to his own room.

(Testimony of Rolland Lindsey.)

The Court: You mean that he would go up there and [341] find his own condoms and bring them downstairs?

Mr. Ziegler: It shows the possibility.

Mr. Gilmore: The empty can; when he said, "Here is the proof against him".

The Court: Well, I think that the connection between the two is certainly not logical, very tenuous, if anything, and in view of its effect or derogatory nature to the witness Bob Lindsey it will be excluded. It will be stricken from the record, and the jury is instructed to disregard it.

A. May I ask a question then, your Honor, on this?

The Court: No, you may not. You may ask your attorneys any question you want to.

A. I would like to ask you a question (addressing Mr. Gilmore).

Mr. Gilmore: What is it please?

The Court: Well, if you have got a question to ask him or call to his attention, you can wait until you get off the witness stand, and then tell him, and, if he thinks it is important enough, he will put you back on the witness stand.

Q. (By Mr. Gilmore): Now, Rollie, following August 25th, that was the day that Loretta made this retraction, this statement here, you remember that, you or your wife testified, I am sure, that she was around your home almost every day; is that correct? A. That is correct. [342]

Q. Now, during that entire time of the time that

(Testimony of Rolland Lindsey.)

she continued to visit your home, were you and Loretta ever home alone together?

A. Yes, we were; once.

Q. Tell us about that occasion please.

A. The wife was downtown, and Loretta came home, and there were two of the kids there; the wife had the other one with her; and we talked about the trouble that she got in with the authorities at the Wrangell Institute this summer, and that was about all of our conversation.

Q. Now, your wife was downtown and expected home. What was she downtown on, or what kind of a mission, if you remember?

A. She was down to the grocery store.

Q. And what was the entire elapsed time, the over-all time, that you and Loretta were home alone together?

A. I don't believe it was more than twenty minutes.

Q. Now, on that occasion, or on any occasion following August 25th, when she made this retraction, did you say to her, "Do you want it?"

A. I should say not.

Q. Did you ever say that to her?

A. I did not.

Q. You heard her testify, Rollie, that you said that; is that true or not true? [343]

A. I heard her say it, yes; but it isn't true though.

Q. Now, Rollie, did Loretta come back to the house and continue to come around and visit in your

(Testimony of Rolland Lindsey.)

home after the one time that you mentioned when you and Loretta were home together alone?

A. She did for two weeks longer, at least two weeks longer, if not more.

Mr. Gilmore: Take the witness.

Cross Examination

Q. (By Mr. Munson:) Mr. Lindsey, the day you went up with Loretta to the attorney's office, August 25th, do you remember that day?

A. I do, very plainly.

Q. Who told you to come up there or to bring her up there?

A. Nobody told me to bring her up there. My lawyer advised me to bring her up there.

Q. Well, who advised you to bring her up there?

A. Robert Zeigler.

Q. And when you went up there with her you remained in the room all during the time that——

A. That is right.

Q. ——that the questions and the answers were being given? A. Yes.

Q. Didn't you talk over some of these questions with Loretta? [344]

A. I didn't talk any questions over with her.

Q. You didn't say anything while you were there?

A. Oh, I did, yes; five or six times, I guess. I wouldn't even say how many, but she would ask me about a date or something like that.

Q. Well, do you remember what you said?

(Testimony of Rolland Lindsey.)

A. No, I don't.

Q. You don't remember any specific facts that you told her about or suggested to her?

A. Well, facts that I told her about would have been nothing but a date or just some small thing that she would ask me.

Q. Well, let me call your attention to some of these answers. Isn't it a fact that you suggested substantially this answer to a question: "I kind of wanted to go to my step-mother's in Seattle and I phoned her up and she didn't know what to do. I was kind of disappointed and I really don't know exactly why I said what I did about my father and that is the only reason I can think of that I did it." Didn't you suggest that answer? A. I did not.

Q. Do you recall her making that statement?

A. I don't recall it.

Q. Do you recall everything she said that day? Do you know what is in this affidavit? [345]

A. Oh, well, I know now, absolutely. I have read a copy of it.

Q. Do you have a copy of this? A. I do.

Q. Have you read it over?

A. Certainly, I have read it over. I wouldn't say that I remember any specific part of it. I don't know, if you ask me what a certain question or the answer to it was, as it is in there, I don't say that I can answer it, but I know what the gist of the statement is; I mean, what the meaning of it is, I certainly do.

(Testimony of Rolland Lindsey.)

Q. Well, what I am trying to find out, Mr. Lindsey, is how much of this statement is what you said or suggested and how much of it is what she said.

Mr. Gilmore: I object, if the Court please. He has answered that. He said in four or five instances he participated in the discussion with nothing substantive but pertaining to dates and things like that.

The Court: I think you better call his attention specifically to the statements that you think he made or suggested, otherwise it is going to be rather impossible to answer that question you ask.

Mr. Munson: Yes, your Honor. I realize that this is difficult cross examination, but I am curious to know how much of this—— [346]

Q. (By Mr. Munson:) You said you might have suggested dates or times?

A. I might have. I wouldn't even remember. If you named one, I wouldn't remember whether I had on that one or not. I had very little to do with this.

Q. Except that you brought her down in the morning and you went down with her in the afternoon when she signed this statement?

A. That is right.

Q. Being at the time her adopted father?

Mr. Gilmore: This is superfluous, if the Court please. That is in the record.

Q. (By Mr. Munson): Well, I find only two dates in the entire statement.

A. It wouldn't necessarily have to have been a date. It could be a time or place. I am not sure. I don't remember.

(Testimony of Rolland Lindsey.)

The Court: I think that the way to make this cross examination understandable is to call his attention to what you or your witnesses contend he said or suggested there.

Q. (By Mr. Munson): Well, I am trying to find a place now or a time that you might have suggested. The affidavit doesn't contain much of the information that you talked about. Now, how about this one? The witness was asked: "Have you ever asked your Dad and Mother here if you [347] could go and live with your step-mother in Seattle?" And the answer is: "Yes, and they were willing, but my step-mother didn't want me at that time."

Mr. Gilmore: What is the question?

Mr. Munson: I just read the question.

Mr. Gilmore: No. You read the question and answer there. Now what is the question?

Q. (By Mr. Munson): Did you suggest that answer? A. I did not.

The Court: Well, he asked if he suggested or told her to make that answer, so it was complete.

A. No, I didn't tell her.

Q. (By Mr. Munson): You didn't suggest that answer?

A. I did not, and I didn't tell her or whatever you want to call it.

Q. All right. Now, after this visit to the attorney's office, Mr. Ziegler, Robert Ziegler's office, a few weeks later you had a birthday dinner for Loretta, didn't you?

A. Well, I know she was up to our house on her

(Testimony of Rolland Lindsey.)

birthday, and I bought a present for her through my wife's asking me.

Q. Do you remember what you bought her?

A. Something in the drugstore; I don't know; the wife told me just what to get, and I bought it.

Q. Do you remember the birthday card you got her? A. Well, I know she had one. [348]

Q. Did you buy it? A. I bought it.

Q. Well, did you look at it? Do you remember what the card was like?

A. No, I don't remember.

Q. Well, if I were to describe it to you, would it refresh your memory?

A. I doubt it very much.

Q. You doubt it?

A. I doubt it very much.

Q. Well, I will describe it for you anyway.

Mr. Gilmore: I object to the immateriality of this line of questioning and also as to its being proper cross examination. I think this is a detail, that he has admitted, that he got her a present, and he has admitted he got her a birthday card. Now, I think that that has gone far enough on cross examination.

The Court: Well, if there is something significant about the nature of the gift, you may go into it, but otherwise it would seem immaterial.

Mr. Munson: Well, I will leave that for the moment.

Q. (By Mr. Munson): You say, on your direct testimony yesterday you said that during that

(Testimony of Rolland Lindsey.)

month, that the Judge ruled you had to limit your testimony as to hostility to, you stated that during that month that you slapped [349] Loretta once, only once?

A. At one time, at one particular instance. I think I slapped her two or three times during that time.

Q. She was out in the kitchen?

A. That is right.

Q. Now, isn't it a fact that the reason that you slapped her was because she hadn't cleaned out the bread drawer? A. No.

Q. And not because she said something to Mrs. Lindsey? A. It is not.

Q. You remember that pretty clearly?

A. I certainly do. That was just before she ran away, and I remember very clearly.

Q. You remember that quite well, don't you?

A. Well, yes. I know why I corrected her, absolutely.

Q. But you don't remember an incident that occurred just three months ago? Your memory is pretty foggy about what went on the day of this affidavit?

A. It isn't foggy. I remember what we done, but I don't remember what questions or what things that we talked about in these questions that he asked her. If she asked me a date, I don't remember what it was. There are three sheets there, and I didn't say but very, very little when that went on. Mr. Ziegler did the questioning, and she did the

(Testimony of Rolland Lindsey.)

answering, and, as I said, one or two times, or [350] four or five times—it might have been six times—she asked me about a date or a time or a place, and I answered it, and then she would think that it was that too or——

Q. Now, you said on your direct that you were in a logging camp or some camp outside of town——

A. I didn't get the first part of that. I am sorry.

Q. You said on your direct testimony that you were in a logging camp after you heard that Loretta made these charges against you?

A. I went back out to my camp; yes.

Q. And then, as I remember your testimony, you came back? A. I did.

Q. Now, what time did you come back, what time of the day?

A. Well, I believe that is after I knew about this that you are speaking of.

Mr. Ziegler: Talk a little louder, Rollie.

A. It was after I knew about this that you are speaking of, the time. The next time I came to town was after that.

Q. (By Mr. Munson): Well, how about the first time?

A. The first time when I came in?

Q. Following the first time.

Mr. Gilmore: If the Court please, my only objection is—"what", "how about it", "how about what"—the question is vague and unspecific and unintelligible.

The Court: If it is unintelligible, he can say so.

(Testimony of Rolland Lindsey.)

I think that the question can be understood as being as to when he got into town the first time after the complaint was made.

A. Oh, yes. I got in, oh, around 11:00 o'clock, 11:30, 12:00 o'clock.

Q. (By Mr. Munson): Fairly late that evening?

A. Yes.

Q. Was that the evening that you found out that these charges had been made?

A. That is right.

Q. And when did you find out?

A. Oh, it was 2:00 or 2:30 in the morning, after we went to bed. My wife didn't tell me before.

Q. You said that your wife didn't tell you until 2:00 a.m. that night?

A. 2:00 or later. It might have been 2:30; I am not sure.

Q. And you came back about 11:00?

A. Yes.

Q. Nothing was said about this when you came home?

A. I asked her where the kids was, and she said they had left home again, and I said, "Why?" And she wouldn't tell me, and afterwards I asked her why she hadn't told me, and she said because there were two boys—they are actually young, grown men—were in the house and——

Q. Mr. Lindsey, I am not asking you for all these details. [352]

A. Well, you asked me why, and I told you.

Q. What I want to know is whether anything

(Testimony of Rolland Lindsey.)

was said when you came home, and you said, "No." That was the answer?

A. What do you mean by "was anything said"? That could be anything.

Q. I mean about the charges now——

Mr. Ziegler: He just started to tell about it, your Honor, and answer the question, what was said.

The Court: It was not responsive to the question as to what was said about the charges.

Q. (By Mr. Munson): You say that your wife told you that the kids ran away or went away when you noticed they weren't there that trip?

A. Well, she said they ran away or went away, and she might not have even that, but she did tell me——

Q. Well, didn't you hear Mrs. R. D. Pawsey——

A. You didn't let me answer the question. You asked me one.

Q. You answered all I wanted to hear. Didn't you hear Mrs. R. D. Pawsey say that she came up to the house and got Loretta and brought her back to her house?

Mr. Gilmore: That isn't the testimony, if the Court please. It is that Mrs. Pawsey brought Loretta down to the Lindsey home.

Mr. Munson: The testimony is that Mrs. R. D. Pawsey came up to the Lindsey home and took Loretta back with her to [353] live with her.

Mr. Gilmore: That is absolutely a misstatement. It is absolutely wrong.

The Court: Well, the jury will have to rely on

(Testimony of Rolland Lindsey.)

its own memory. If they think it is sufficiently important, they can have it read.

Mr. Gilmore: Absolutely.

The Court: Go ahead.

Mr. Ziegler: What difference does it make?

A. Well, if it isn't the right——

Q. (By Mr. Munson): And didn't you say that the second time you came back from the logging camp that Loretta and Mrs. Pawsey were over in Metlakatla? A. I did not.

Q. On your direct examination?

A. No, sir. If I did, it wasn't meant that way at all.

Q. I have it in my notes that way.

A. They were in Metlakatla the first time.

Q. Oh, was it the first time when you came back?

A. It was the next day. When we got up, we found out that she was gone.

Q. And you knew she was with Mrs. Pawsey, and you knew she hadn't run away?

A. Any time the girl leaves her home and goes anywhere, she is running away if she says she is not coming back. [354]

Q. Oh, is that what you call running away—any time she leaves and stays with a relative, with her grandmother?

A. Well, in the manner that my wife told me this, absolutely.

Q. Didn't your wife tell you that the grandmother had come up and got Loretta?

(Testimony of Rolland Lindsey.)

A. No. She said she brought Loretta up with her.

Mr. Gilmore: I submit to the Court that that is not the testimony in the case. The child came home that afternoon—didn't come home. Remember? Mrs. Lindsey testified it was getting late, late, late in the day, and she didn't come home.

The Court: Well, I don't know what the testimony is. There are so many immaterial details in here now that I don't know how anybody could remember, so that——

Mr. Gilmore: It is so clear in my mind.

The Court: ——counsel will have to use his own recollection in good faith, and I assume that is what he is doing.

Mr. Gilmore: I wouldn't submit it if there were any doubt.

Mr. Munson: Well, your Honor, there is no doubt in my mind as to what the witness said.

Mr. Gilmore: Fine. We stand on the record.

Q. (By Mr. Munson): Now, after the affidavit, or the statement—it is not an affidavit really—after this statement [355] was all signed, a copy given to the Marshal, you thought that was the end of it; is that right?

Mr. Gilmore: I object on the ground that it would be immaterial, if the Court please,——

The Court: It is cross examination on his motive.

Mr. Gilmore: ——as to what he thought.

The Court: It is cross examination. Objection overruled.

(Testimony of Rolland Lindsey.)

A. I had no idea what it was. I am not a lawyer.

Q. (By Mr. Munson): Oh, you didn't know what it was?

A. I had no idea. I did not. I thought that that would be the end of it because she came home and——

Q. Well, didn't you tell several people in the neighborhood that it was all over?

The Court: He just go through saying he thought it would be the end of it.

Mr. Munson: Oh.

A. I am not a lawyer, as I said.

Q. (By Mr. Munson): Well, after that, on this afternoon that you testified to when Mr. Gilmore was examining you about the time you were alone with Loretta, didn't you tell her then, that afternoon, that you couldn't leave her alone?

A. You mean the same day as this was made out?

Q. No. This is afterwards; the day that you told Mr. Gilmore that you were alone in the house with Loretta? [356]

A. And didn't I then what?

Q. Didn't you tell Loretta that you didn't think you would be able to leave her alone?

A. I certainly did not.

Mr. Gilmore: Speak up a little louder so the jurors at the end of the box can hear.

A. I did not.

Q. (By Mr. Munson): Did you search Loretta's room after she left your house last April?

(Testimony of Rolland Lindsey.)

A. Not until the other part of the family had searched it.

Q. You mean you got in on the searching part of it rather late; but you made a search?

A. After they had searched it, I did.

Q. Did you find anything? A. I did not.

Q. Did you destroy those cotton balls that you heard testified about?

A. I never found any to destroy.

Q. Now, when you were taking this witness down to Mr. Ziegler's office, on the way down during the five or ten-minute walk, did you or did not say to Loretta substantially these words: "Well, I sure thought you liked it. I was real mad when I found out what you had said."

A. That sounds like Loretta's talking. I never said anything like that. [357]

Q. You didn't say anything like that?

A. No, I didn't. It just sounds like the way she would say things, or says things, rather.

Q. Now, you testified on direct about an incident that occurred on New Years Day of this year, 1954 New Years, and, as I recall your direct testimony, you don't recall much about that day?

A. No; it wasn't important.

Q. Well, do you remember that you had a fight with your wife that day? A. No.

Q. An argument and——

A. What do you mean by a fight?

Q. I mean an argument?

(Testimony of Rolland Lindsey.)

A. I have never had a fight with my wife in my life.

The Court: Well, he is talking about argument now, so let's——

A. First he asked me if I had had a fight with her, and I never have. I have never touched my wife in my life.

Q. I clarified my question. An argument with your wife?

A. We might have had a disagreement. I don't know. I don't remember.

Q. All right. Call it a disagreement then. Did you have a disagreement with her?

A. I don't remember. I couldn't answer something that I [358] don't remember.

Q. In other words, you could have had a disagreement?

A. We could have had one, or we could not have had. I don't know.

Q. And she could have packed up the kids and gone some place else? She could have gone to see her cousin or sister or mother?

A. She could have went over there. I don't say that she didn't even. She didn't have to go because we had an argument. She could have went over there to visit them.

Q. And, after she was gone, isn't it a fact that you were there with Loretta and Robert and you told Robert to go out and play?

A. You can ask me all the questions on New Years Day that you want to, and I do not recall

(Testimony of Rolland Lindsey.)

any of them. Whether he went downtown, whether he was outside playing, whether I was home with her alone, whether my wife was there, or any part of it, it isn't significant to me at the time, and I don't remember it, so your questions will all be the same, and you are wasting the Court's time.

The Court: It is for the Court to determine whether its time is being wasted here, not you.

A. Ask me again.

Q. In other words, that day is just a sort of a big blank in your mind? [359]

A. Not any more so than any other day that I would pick during the year. Maybe there are some of them that are significant, but that one isn't.

Q. That day, New Years Day, just isn't significant?

A. Just wasn't significant. I haven't said that I was there alone with her or that I wasn't. I could have been. I won't say that I wasn't because I don't remember.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; the defendant Rolland Lindsey resumed the witness stand, and the Cross Examination by Mr. Munson was continued as follows:

Q. Now, Mr. Lindsey, you said that when this affidavit, this statement, was being made——

A. Would you stand back a little farther please?

Q. ——up in Mr. Ziegler's office, that you suggested dates, names, times and places?

(Testimony of Rolland Lindsey.)

Mr. Ziegler: Now, if the Court please, I don't think that is a fair question. I don't think he stated he suggested anything. His testimony was that——

The Court: Well, if he did, it was times or dates or places or something of that kind.

Mr. Ziegler: He said it might have been asked, but he didn't say he suggested it.

Mr. Munson: He said he might have supplied them. [360]

Mr. Ziegler: But after being asked.

The Court: That is my recollection, that he testified that he might have——

Mr. Ziegler: After he was asked, but not the form of that question that he suggested it.

Mr. Munson: He didn't make any statement like that.

Q. (By Mr. Munson): You said that you made about five or six?

A. I don't remember how many it was.

Q. I just want to go through this affidavit with you. Did you suggest to Loretta that she was "fourteen years old"? A. No.

Q. That she was "in the 8th grade at school"?

A. No, I did not.

Q. That the charges were filed against you "about five months ago"?

A. I don't remember if I did or I didn't. I don't recollect.

Q. That she was "in the hospital" at the time of the preliminary hearing?

(Testimony of Rolland Lindsey.)

A. I don't know whether I did or not. I don't remember.

Q. That her step-mother lives in Seattle?

A. I don't know. I don't know which one of those questions she asked me so I can't answer you on them at all.

Q. That she left Wrangell August 22nd or 23rd?

A. I don't know.

Q. That she was in Wrangell? [361]

A. I don't know.

Q. That the Lindsey home is on Woodland, or that her name is Lindsey? Those are the only dates, names, places, that I can see in there. Would you tell me what you did suggest to her?

A. I didn't suggest anything to her.

Mr. Ziegler: If the Court please, I object to that again, the inference that he suggested anything to her. That wasn't his testimony as I recall it. He never stated he suggested anything to her.

Mr. Munson: He said he supplied it.

Mr. Ziegler: The gist of his testimony was that it may have been discussed.

The Court: He did testify to suggesting or possibly suggesting one or more matters, but in view of the fact that he also has testified that he doesn't remember them, of course, counsel is permitted to ask him specific questions.

Mr. Ziegler: As long as he don't put it in the form of a suggestion coming from him, I have no objection to it.

(Testimony of Rolland Lindsey.)

The Court: On cross examination you could ask a witness, "Didn't you say" so and so.

Mr. Ziegler: That is all right. I don't object to that.

The Court: Well, that is all he is doing. [362]

Q. (By Mr. Munson): Would you tell the jury and the Court what names or dates or places you discussed or supplied? A. I don't remember if I did.

Q. It would be useless to look at this; is that the idea?

A. As far as me suggesting anything to her on that, yes. If she did ask me a question, I don't remember what it was.

Q. Now, you stated on direct examination that after this time that you were alone, after this date of the affidavit, you were alone with Loretta for, you said, twenty minutes, I believe?

A. Approximately.

Q. Approximately twenty minutes. That after that time, in which you denied having made any advances, sexual advances, upon her, and after that time she continued to come to the house, were you ever alone with her again?

A. Not that I remember.

Q. She came to the house to see the kids; isn't that it?

A. She came to the house to see us all, from her actions, the way she—I mean to say that was the impression that anyone would get. If I was downtown, she would run up the street to see me, and that was after this time that she claims that I said this to her.

(Testimony of Rolland Lindsey.)

Q. And you say you never were alone with her again?

A. I am not sure but I don't believe that I was. I don't recollect. [363]

Q. Well, you said that you were never alone with her after that date.

A. That is the only time that I can remember that she was ever in the house alone with me.

Q. Now, as I recollect, when—you said that when you came back from some of your trips, or did you say, when you came back home, there was always a big fight, a family fight?

A. That was after trips, that is, after I had been gone away from home for a few days.

Q. Well, who were the fights with? With your wife?

A. They would be between the wife and the children.

Q. Well, you just said a few minutes ago that you had never had a fight with your wife.

A. I didn't say that I had now. I told you that the trouble was between the children and the wife, and there was always a big squabble when I came home about it. They met me at the door usually, the two kids, and started telling me their troubles.

Q. Well, I just wanted to—I remembered you saying that you came home and there was always a big fight. I just wondered what you meant by it.

A. I meant by that that there has always been trouble between the wife and the children because of their actions, the older children. [364]

(Testimony of Rolland Lindsey.)

Q. Who did you stick up for, the kids or——

Mr. Ziegler: Now, if the Court please, I don't think it is cross examination or material.

The Court: Well, I don't think it is material.

Q. (By Mr. Munson): Now, during this month prior—I have already asked you part of this; I want to clarify it again—during this month prior to the time the charges were brought against you, you said that you had only one occasion to slap Loretta and that was that kitchen incident?

A. Yes, I think so.

Q. Do you remember when that was?

A. Well, it was the week end before I went out that they ran away. In other words, we knew nothing about them. I didn't know anything about them running away. It was just the week end before that the kids run away when I was in, and I believe I was out for ten days at a time, ten days to two weeks, at the camp.

Q. Well, it was about two weeks before; is that it?

A. Well, approximately; I can't tell you just to the day.

Q. But that was the only time that you used violence on her during that period?

A. That is right.

Q. Now, on this New Years Day that you can't remember, isn't it a fact that you committed an act of sodomy on [365] Loretta?

A. I didn't; no, sir.

Q. Isn't it the fact?

A. It is not.

(Testimony of Rolland Lindsey.)

Q. New Years Day 1954? A. No, sir.

Q. After you sent Robert down to the store?

A. I don't know if I sent him to the store.

Q. And pulled the shades down?

A. I am not sure of any of that. I don't remember.

Q. You mean you are not sure whether you committed an act of sodomy on her that day?

A. I certainly am sure that I did not.

Q. Now, you said on October 22, 1951, that all you remember about that day is the fact that the baby was born and you got into town from a hunting trip and went up to the hospital, and then you state that——

A. Well, that isn't all I said, but that is part of it.

Q. That you slept from noon until 6:00 p.m. that day? A. That is right.

Q. Now, do you recall that that period of time encompasses the time when the complaining witness said that you had committed an act of sodomy and had intercourse with her?

A. That is right; I remember that, that she said that.

Q. You remember that she said it was around 1:30 in the [366] afternoon?

A. I don't remember what time she said, but I know she said that.

Q. Now, isn't it a fact that you told her to stay home from school that afternoon?

A. I don't remember.

(Testimony of Rolland Lindsey.)

Q. To wash the clothes?

A. I don't know whether she was home. I stated that already. I don't know whether she was home that day.

Q. Well, you said she was home at the noon hour?

A. She was. Both of them were.

Q. I am asking you, didn't you tell her at that time to stay home and wash the clothes?

A. I don't remember about that.

Q. And shortly after, about 1:15 or 1:30, you asked her to go into the bedroom with you and when you were in there you had intercourse with her and committed an act of sodomy upon her? Now, isn't that the truth?

A. That is not the truth.

Q. Now, October 23, 1952, you don't remember anything about that day except the fact that the second baby was born?

A. I was at home. I didn't go on a hunting trip that year, so I just don't recollect except that the baby was born at that time. I was in town for a number of days before and a number of days after.

Q. You remember that you were in town?

A. I was home every time one of my babies were born.

Q. And then, February 27th, you don't remember much about that day; that was this year; but you don't remember much about that?

A. I remember that my babies were born, but it wasn't significant, anything else wasn't significant to me at that time.

(Testimony of Rolland Lindsey.)

Q. Is that the night Bob and Loretta were up at Florence Dalton's house when you came in?

A. I don't remember.

Q. And you called up and asked Florence to send them home the following morning?

A. I could have. I just don't remember.

Q. You just don't know?

A. I don't remember.

Q. You brought out some personal information on your direct testimony about the fact that you and your wife didn't use contraceptives, rubber sheaths. Now, isn't it a fact that you wanted children by Victoria?

A. We wanted the first two, but we weren't anxious to have the third one.

Q. And isn't it a fact that a pregnancy of Loretta would have been disastrous to you because of the things that you were doing to her? [368]

A. That has never entered my mind.

Mr. Ziegler: Just a moment. We object to that as a very highly prejudicial question and improper cross examination.

The Court: I think it is perfectly proper cross examination in view of the testimony. Objection is overruled.

Mr. Ziegler: What was the question? Do you understand the question, Mr. Lindsey?

A. I did; I believe I did.

Mr. Ziegler: Did you answer it?

A. I said it never entered my mind.

Mr. Munson: He understood it.

(Testimony of Rolland Lindsey.)

Q. (By Mr. Munson): Mr. Lindsey, do you recall, after this affidavit or statement was signed, you were with Loretta and your wife and Loretta's grandmother and you were discussing the fact that the charges were dropped in this case, and Loretta brought up the point, "What about the medical examination I have had," and you knew she had a medical examination, didn't you?

A. Yes; I knew that.

Q. And you knew that the medical examination showed that she was definitely not a virgin?

A. I knew that.

Q. You knew that? A. Yes; I knew it.

Q. And she brought that up and reminded you of it. Didn't you tell her in front of those people on that occasion, "If anyone asks you about that, tell them you stuck a banana up you"?

A. I don't remember her asking anything of that nature, and I never told her any such thing.

Q. You just don't recall?

A. I know I never told her any such thing, and I don't remember her saying anything. I am sure that that kind of a subject never came up at home.

Q. You testified on direct examination that after you heard about these charges that you went back to your logging camp? A. That is right.

Q. And that you didn't think much about it?

A. I didn't. I thought about them, but then these kids had run away many, many times and accused their mother——

Q. Well, are you suggesting that because a child

(Testimony of Rolland Lindsey.)

runs away once or twice or three times that they are going to make up a complete set of facts showing sodomy over a sustained period of time, Mr. Lindsey; are you suggesting that?

A. I am not a doctor. I can't answer those questions.

Q. You think a doctor could answer that?

A. There is something wrong with Loretta, is what I think.

Q. Oh, you think there is something wrong with Loretta? [370]

A. I certainly do, mentally; I certainly do.

Q. You think Loretta is mentally off?

A. I certainly do.

Q. Has it occurred to you that you might be mentally off? Don't you think the testimony would show that? A. I do not.

Q. You were calm; you didn't think anything about it; you went to your logging camp assured that nothing would come of it?

A. If you think I was calm, you are off your beam because I was——

Mr. Ziegler: A little louder, Mr. Lindsey.

A. If he thinks I was calm after being accused of such a thing as this, he is badly mistaken.

Q. (By Mr. Munson): Well, didn't you tell your attorney that you were calm?

A. I don't remember any such a statement that I remember of.

Q. I certainly recall your saying that you were calm and you didn't think much about it.

(Testimony of Rolland Lindsey.)

A. I said I had a boom that I had to go out there and get regardless, and that these kids had caused us trouble before, and that I felt that it would be taken care of when I got in and I got with them and got the family so that we could talk it over.

Q. In other words, you weren't calm? You were rather [371] rattled by these charges?

A. I wasn't rattled by them whatsoever, but I felt terrible about them; I will tell you that.

Q. You felt ashamed?

A. I didn't feel ashamed at anything. I have nothing to be ashamed of.

Q. You have nothing to be ashamed of?

A. I do not.

Q. Have you ever heard of a psychopathic personality, Mr. Lindsey?

Mr. Gilmore: I object, if the Court please, as immaterial.

A. I don't even understand the word.

The Court: Objection overruled.

Q. (By Mr. Munson): A psychopathic personality is a person who doesn't care, who has nothing to be ashamed of, no matter what he does.

Mr. Ziegler: That isn't my understanding of its definition, and I think, your Honor, we are getting into the field of science here that perhaps—I know I don't know too much about it, and maybe Mr. Munson is an expert on it, but certainly this witness isn't.

The Court: There is nothing wrong about an

(Testimony of Rolland Lindsey.)

examination in which the witness is asked his own opinion about himself, his mentality. Objection is overruled. [372]

Mr. Ziegler: Well, I know, but that is all right; I don't object to that; but using medical terms without first determining whether the witness knows what the term is——

The Court: Well, as far as cross examination is concerned, it wouldn't make any difference whether he misused the term or whether it was incorrect. It is cross examination.

Mr. Ziegler: Except that it is misleading to the witness.

Q. (By Mr. Munson): What are you laughing at? A. Who is laughing?

Q. You were. Do you think this is funny?

Mr. Gilmore: I object, if the Court please.

The Court: Objection overruled.

Q. (By Mr. Munson): Well, as I understood your direct testimony, Mr. Lindsey, the only occasion in that month's period of time prior to the filing of this complaint, which initiated this action against you, the only time that you had a run-in or a squabble with Loretta was over that kitchen episode when you slapped her?

A. It wasn't a run-in or squabble. I corrected her.

Q. You did what a father would do to a child?

A. I did.

Q. And that is the only act of discipline, act of

(Testimony of Rolland Lindsey.)

violence, that you used upon her during that period of time?

A. You mean by slapping her or something of that nature? [373] That is right, as far as I remember. I wouldn't swear to that now, but that is the only thing that I can recall, the only time that I slapped her, because in three years it had been very, very seldom that I ever slapped Loretta.

Q. You didn't make it a practice of slapping her?

A. I did not. I hadn't spanked her since she was—I don't know how many years. I hadn't spanked her for a long, long time.

Q. In other words, you were a pretty indulgent father to her?

A. I don't understand your meaning of that.

Q. You were indulgent. You weren't cruel to her?

A. I certainly wasn't.

Q. And she would have no reason to feel hostile toward you then, would she?

A. Oh, from the corrections; but I was talking about the slapping and so forth; but there were restrictions and things of that nature.

Mr. Munson: No further cross examination.

The Court: How old are you?

A. Forty-one.

Mr. Gilmore: That is all. No redirect. You may be excused from the stand.

(Witness excused.)

Mr. Gilmore: If the Court please, I have a request, but first I would like to read to the jury—

it hasn't yet been [374] read to them—Defendant's Exhibit No. B, about which considerable testimony has been adduced from the stand about this statement. This is Defendant's Exhibit No. B, the statement which has been testified to here in the last two or three days. It reads:

“The following statements were made by Loretta Lindsey in response to questions put to her by Robert H. Ziegler, Sr., at 10:15 A.M.,” and that of course is the same Robert Ziegler that testified to it yesterday, “at 10:15 A.M. on August 25, 1954, in the offices of Ziegler, Ziegler & Cloudy, attorneys for Rollie Lindsey, defendant in the case of the United States of America -vs- Rollie Lindsey. Those present at said time and place were Loretta Lindsey, Rollie Lindsey, Robert H. Ziegler, Sr., and Ruth Francis, Secretary.

Q. Please state your full name and age.

A. Loretta Lindsey. I am 14 years old and in the 8th grade at school.

Q. Do you consider Mr. Lindsey your father?

A. Yes.

Q. Why are you here this morning?

A. So that I can drop this charge against him which isn't true.

Q. Are you here of your own free will?

A. Yes.

Q. This is purely voluntary then? [375]

A. Yes. I went home this morning for the first time in months and told my father that I was now prepared to tell the truth.

Q. Has anyone threatened you or tried to force you to come here and do this? A. No.

Q. When did you prefer charges against your father?

A. I don't know exactly, but it was about five months ago.

Q. What did you charge him with having done?

A. Well—according to what I told “them” he was charged with rape, sodomy and contributing to the delinquency of a minor.

Q. Did you testify to that at the preliminary hearing? A. Yes, I did.

Q. Did anyone else you know appear to testify against him?

A. I don't know. I said what I had to say and then I left. I signed the complaint.

Q. Who went with you?

A. Reverend Grissett brought me up there and Mr. Davidson.

Q. At the time this preliminary hearing took place Loretta, were you living at the Lindsey home?

A. No, I wasn't. I was in the hospital. I had run away from home.

Q. Loretta—why did you and your brother run away?

A. I kind of wanted to go to my step-mother's in Seattle and [376] I phoned her up and she didn't know what to do. I was kind of disappointed and I really don't know exactly why I said what I did about my father and that is the only reason I can think of that I did it.

Q. You mean then that by saying what you did

you thought you would be able to go to live with your step-mother? A. Yes.

Q. Then you made this whole thing up "out of the whole cloth"? A. Yes.

Q. You mean that this is nothing but a figment of your imagination? A. Yes.

Q. Did you realize Loretta, when you testified to all these charges in the Commissioner's Court at the preliminary hearing, that you were under oath to tell the truth?

A. I knew I was under oath but that didn't mean anything to me then. But when I was up in Wrangell, Jack (Krepps), the Marshal up in Wrangell told me what it meant when you lie under oath. I believe he had an idea I had been lying. Last Sunday and Monday (August 22nd and 23rd) I told him I was lying. When we talked about it, he didn't want Mrs. Krepps to be there as she didn't know anything about this, and he didn't want her to hear what I said as they were friends and I had stayed with them [377] in Wrangell one time.

Q. Why are you making these statements now, Loretta?

A. I want to go back to my family and I don't want the little Lindsey kids to have their Dad taken away from them for something he didn't do.

Q. You realize you have done a pretty serious thing to Rollie? A. Yes, I know.

Q. Did you name specific instances and dates at the hearing? A. Yes, I did.

Q. Where were they supposed to have taken place?

A. At our home on Woodland Avenue, when Mrs. Lindsey was having children. They were the only dates when I knew he was home as he is gone a lot of the time.

Q. That is the reason you named those specific dates then, because you knew if the authorities checked they would find out that he was at home at those times? A. Yes.

Q. You must have hated him pretty badly to have made such charges.

A. I thought I did, but I was wrong.

Q. What would you like me to do about this?

A. I would like to have these charges dropped. I believe the U.S. Attorney has already dropped the case as Mr. Krepps called him up and asked him to. [378]

Q. You know I intend to send a copy of your statement to the District Attorney immediately, because if what you say now is true, and I presume it is, the charges you made previously are very serious and you have just about destroyed your Dad's reputation in the Community?

A. Yes, I know.

Q. I am going to have you sign this statement, under oath, and it will in effect result in your stating, under oath, that you lied previously, under oath. Can you think of anything else you would like to tell me, Loretta? A. No.

Q. Have you ever asked your Dad and Mother here if you could go and live with your step-mother in Seattle?

A. Yes, and they were willing, but my step-mother didn't want me at that time.

Q. Where did you get the idea to do this, Loretta?

A. I don't know. I read a lot of mystery stories and I guess that is where I got the idea.

Q. You are familiar with the word "frame" then and that is what you thought you would do to your Dad?

A. Um humm.

Q. Who was the first person you went to with this story?

A. I don't know.

Q. You had the idea after you left the Lindsey home?

A. No, before I left. [379]

Q. Where did you go when you left?

A. To my grandmother's.

Q. And then you put the idea into effect?

A. Yes.

Q. If you were already out of Rollie's home, why did you have to use this method?

A. It would have been pretty hard to go to the States—to get out of town.

Q. When you finally decided to put the plan into operation, who did you go to see?

A. Well—the Don Riewalds knew. I told them I wouldn't be baby-sitting for them anymore and he asked me why and I said my folks were kind of mean to me and he said I wasn't telling them all, and so I did and I don't know whether he believed me or not but he said to go see the City Magistrate and that is where I went.

Q. Then you lied to him—you lied to the Magis-

trate—you lied to the Marshal—and you lied to the U.S. Attorney? A. Yes.”

Signed, “Loretta Lindsey. Subscribed and sworn to before me this 25th day of August, 1954, at Ketchikan, Alaska. Robert H. Ziegler, Notary Public for Alaska.”

Mr. Munson: Your Honor, I request the Court to instruct the jury that on the basis of the testimony adduced that this statement is not a verbatim transcript of the meeting [380] that was held at that time and place contained therein.

The Court: Well, I think that that is understood. There isn't anything here that shows or pretends to show that it is verbatim.

Mr. Gilmore: Now, if the Court please, as I indicated——

Mr. Munson: Your Honor, before counsel goes on, I would like to have permission to recall the defendant for one question.

The Court: What were you going on to?

Mr. Gilmore: Well, I was going to ask leave of the Court to recall Loretta Lindsey for a question on one subject matter. However, we have a witness in the courtroom now, and this of course will expedite the trial, who is a physician and surgeon and who has come down from the hospital out of surgery, and we would be glad and willing to call him out of turn at this time.

The Court: It all depends on which will conduce the most to the convenience of the parties, as to whom you call.

Mr. Gilmore: Well, we would like to call Doctor Salazar then please. [381]

LOUIS SALAZAR

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Louis Salazar.

Q. Will you state your business, occupation or profession? A. Physician and surgeon.

Q. And are you a duly qualified, licensed, practicing physician and surgeon in the Territory of Alaska? A. Yes, sir.

Mr. Munson: We will concede his qualifications.

Mr. Gilmore: Thank you, counsel.

Q. (By Mr. Gilmore): Now, Doctor Salazar, you just heard counsel acknowledge, admit, your qualifications as a physician and surgeon, and I would like to state to you that there has been testimony in this trial of a broken hymen on a young woman, a girl, and I would like to ask you your opinion as to whether or not such a condition, that is, a broken hymen, necessarily indicates that a woman has had sexual intercourse?

Mr. Munson: I object, your Honor.

The Court: Well, objection sustained. It doesn't take all the facts that are in evidence here upon which the opinion of Doctor Stagg was based.

Q. (By Mr. Gilmore): Well, now Doctor, I will

(Testimony of Louis Salazar.)

ask you this question. Could a broken hymen be caused by things other than sexual intercourse?

Mr. Munson: I object, your Honor.

The Court: Objection sustained.

Q. (By Mr. Gilmore): Doctor, I will ask you this question. Is it or is it not true that there is such a thing as a rudimentary hymen?

A. That is correct.

Q. And would you explain to the Court and the jury what is meant by that?

Mr. Munson: I object to that, your Honor.

The Court: Objection sustained. It is immaterial.

Mr. Gilmore: That is all the questions.

The Court: I assume there is no cross examination.

Mr. Munson: Yes, there is, your Honor.

The Court: Well, he hasn't testified to anything.

Mr. Munson: I realize it is a peculiar situation.

The Court: I just can't see how you could ask him a question that would be cross examination.

Mr. Munson: I was just going to take advantage of the fact that he was there.

Mr. Ziegler: We have no objection to that, if the Court please.

Mr. Gilmore: If you think you can take advantage of [383] something.

Cross Examination

Q. (By Mr. Munson): Doctor Salazar, if you were advised of this set of facts—if you examined a

(Testimony of Louis Salazar.)

young girl, fourteen years old, and you felt no resistance on inserting two fingers into the vagina, no resistance from the hymenal ring, and the muscles—the perineal muscles, is it?

A. Perineal muscles.

Q. —and the perineal muscles were lax, and the inside vaginal walls were completely relaxed, and that you could insert your largest speculum into the vaginal cavity with ease, and that on inserting two fingers into the area where the hymenal ring would be that no pain was felt or resistance, what would your opinion be of that?

A. Well, of course——

The Court: That is too indefinite.

A. —you go into a great deal of detail——

The Court: It would have to relate to something.

Mr. Munson: Well, I thought I had enough facts here to ask a hypothetical question, your Honor. If I haven't——

The Court: Well, but the opinion should be as to whether or not she had had intercourse for some period of time. [384]

Mr. Munson: Oh, excuse me, your Honor.

Q. (By Mr. Munson): What would your opinion be about that woman's sexual intercourse pattern?

A. Well, that is quite an indefinite question which can be related to many different items.

Q. Well, would you say that that would be a woman who had had a lot of sexual intercourse?

The Court: Would it be the normal condition

(Testimony of Louis Salazar.)

of a woman who has had a lot of intercourse—would be the question.

A. Of course, you would have to provide that it is in existence to begin with.

Q. Well, you have to assume those facts.

Mr. Munson: I think we will just forget about it, your Honor, and excuse the witness.

Mr. Gilmore: Thank you, Doctor.

(Witness excused.)

Mr. Gilmore: Now, if the Court please, I was about to say that, I indicated an hour or so ago, that there was through inadvertence an oversight in not asking a specific question of Loretta, and with leave of the Court I would like to call her back just to question her on one specific instance, unless counsel, as he indicated, remember, he indicated to the Court that he may be calling her back. If he does, we will gladly wait for that.

The Court: Well, I assume that you will call her [385] in rebuttal, will you not?

Mr. Munson: Well, I don't know whether I will or not, your Honor. I think I will.

The Court: Well, if you don't call her on rebuttal—then you can renew your application.

Mr. Gilmore: Thank you, your Honor.

ORVILLE C. JOHNSON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Orville C. Johnson.)

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please, sir?

A. Orville C. Johnson.

Q. And where do you reside?

A. 1427-A Millar Street, Ketchikan, Alaska.

Q. And what is your business, profession or occupation?

A. I am in the bar business here in Ketchikan.

Q. You are the owner of a bar?

A. Part owner, sir.

Q. Part owner. How long have you lived in Ketchikan, Mr. Johnson?

A. Since 1938.

Q. Continuously?

A. Except for my time in the Service.

Q. Now, do you know Loretta Lindsey? [386]

A. Yes, I know her.

Q. And how long have you known her, approximately?

A. Oh, I have known of her since approximately 1946 and have had her as a baby sitter after we came back from Annette Island; that was in 1949; shortly thereafter.

Q. On several occasions?

A. That is correct.

Q. And you feel that you know her quite well, do you?

A. Well, I know her well enough to have hired her and had confidence in her at the time.

(Testimony of Orville C. Johnson.)

Q. Now, are you acquainted with her general reputation in this community for truth and veracity? A. Yes.

The Court: It has got to be limited to the proper time.

Mr. Gilmore: What, your Honor?

The Court: It has got to be limited to the proper period.

Mr. Gilmore: And is that the thirty-day limitation?

The Court: No. That is the period before the, a reasonable period before the, filing of the charges.

Q. (By Mr. Gilmore): Well, were you acquainted with her general reputation in this community for truth and veracity before the time of—I am trying to think of the date of the complaint, which was April 24th? [387]

A. Yes, I was.

Q. Prior to that time. Now, what is that reputation in this community?

A. Well, the conversations I have——

The Court: He can answer that only yes or not, but you haven't asked him yet the proper question. The proper question is—what is that reputation, good or bad? A. It is bad, sir.

Q. (By Mr. Gilmore): Would you believe her under oath? A. No, I would not.

The Court: It is not what he would do. It has got to be general reputation.

Mr. Gilmore: Yes; that is true.

The Court: The last answer is stricken.

(Testimony of Orville C. Johnson.)

A. Well, it is general reputation that she does not tell the truth, sir.

Mr. Gilmore: And, of course, your Honor, we do have authorities for the last question following the general reputation question.

The Court: That is calling for a personal opinion of the witness, and I have got to rule it out.

Mr. Gilmore: Take the witness.

Cross Examination

Q. (By Mr. Munson): Mr. Johnson, you say you employed Loretta as a baby sitter? [388]

A. That is correct, sir.

Q. Where do you live?

A. At that time I lived at 927 Deermount Avenue.

Q. Deermount?

A. That is correct. I have since sold the home.

Q. When did you sell it?

A. I believe in 1950.

Q. This was before 1950 that she was baby-sitting for you?

A. In that vicinity, I would say; yes.

Q. 1950 and before?

A. Well, to get back to the actual dates, it is quite hard.

Q. Well, it was between 1946 and 1950?

A. Well, between 1949 and 1950, when she baby-sitted for us.

Q. All right. How long did she baby-sit for you?

A. About three times.

(Testimony of Orville C. Johnson.)

Q. Oh, about three times. And did you have any conversations with the neighbors in the community about her? A. She did.

Q. Who did you talk to?

A. Well, not myself explicitly; my wife mostly.

Q. Well, I am asking you now if you talked to the people in the neighborhood, in that community?

A. Well, in the neighborhood, our next door neighbor at the time, which is gone. I have been trying to recall the name and can't. He was the high school—— [389]

Q. Well, when did he leave?

A. I believe he left in 1951.

Q. He left in 1951. You talked to him?

A. Yes.

Q. Your next door neighbor. Who else did you talk to? A. Mr. and Mrs. Robert Baer.

Q. Mr. and Mrs. Robert Baer. Where do they live? A. They live on Revilla and Pine.

Q. Revilla and Pine. Did they live over there then? A. No, sir; they did not.

Q. Well, I am talking about the community.

A. In that general vicinity; no.

Mr. Gilmore: If the Court please, the community means the City of Ketchikan and its environs.

The Court: Yes, but if he wants to start out by asking questions with whom he discussed the reputation—but you better get the name of the first person then.

Mr. Munson: Well, he said he doesn't remember it.

(Testimony of Orville C. Johnson.)

A. I am trying to remember his name and I can't. He was the high school coach in town.

Q. (By Mr. Munson): The high school coach; and he left town around 1951?

A. I believe that is about the correct time.

Q. And you talked to Mr. and Mrs. Baer?

A. That is correct. [390]

Q. And who else did you talk to?

A. Well, I have talked to Mr. and Mrs. J. Dammrell.

Q. Where do they live?

A. They live on North Tongass.

Q. North Tongass?

A. North Tongass.

Q. And you said Mr. and Mrs. Baer live—where did you say they live?

A. I believe it is Revilla and Pine. I don't know the exact house.

Q. Who else have you talked to about Loretta?

A. Well, I have talked to Mr. and Mrs. Bill Bridenstein.

Q. Bridenstein. Where do they live?

A. Well, I believe Bill and his wife were living down here on a boat at Thomas Basin for quite some time, and I don't know whether they are in town at present or not.

Q. They live on a boat at Thomas Basin?

A. He was a logger.

Q. When was this? This was about 1950-1951?

A. No. I talked to them this year, in the last three or four or five months.

(Testimony of Orville C. Johnson.)

Q. In the last three or four or five months?

The Court: That is after the case started. That part of it is stricken.

Q. (By Mr. Munson): Is that when you talked to Mr. Bridenstein [391] and Mr. Baer, in the last three or four or five months? Then who else did you talk to?

A. Well, I talked to Mrs. Hazel Suchy, but that was a few days ago.

Q. A few days ago? A. Yes.

Q. I mean, did your interest in Loretta's reputation for truth and veracity develop within the last two or three months?

A. No, it did not, sir. I can assure you of that.

Q. Mrs. Hazel who? A. Suchy.

Q. How do you spell that; do you know? S-u-c-h-e-y? A. S-u-c-h-i-a, I believe it is.

Q. Where does she live?

A. She is out to camp in Chomley, I believe, in a logging camp. Her and her husband have a logging camp out there.

Q. Where was that?

A. Out by Chomley.

Q. And you talked to her just a couple days ago? A. Just recently; yes.

Q. Very recently. Now, who else have you talked to about Loretta?

A. Well, a lot of people in general. I can't remember all of their names. [392]

Q. What did you ask them? What did you talk about?

(Testimony of Orville C. Johnson.)

A. Well, we was talking about the truth of Loretta in reference to baby sitting because we lost a few articles in our home and we have never been able to pin-point it down.

Q. This was before 1950?

A. This was in 1950.

The Court: Any conversation has got to be limited to her reputation for truth and veracity, not to theft or anything of that kind. That is what your question has got to be limited to.

Mr. Munson: That was unresponsive to my question.

Q. (By Mr. Munson): Well, who else have you talked to about Loretta?

A. Well, it would be quite hard, sir, to try to recollect all of them.

Q. Well, did you talk to these people, or did your wife talk to them?

A. My wife has talked to some, and I have talked to several of them.

Q. And you did this talking to them around the time of the baby sitting, around 1950?

A. That is correct.

Mr. Munson: Your Honor, I move that his testimony be stricken on the ground that the people that he has talked to were all four years ago or else within the last two or [393] three months; both times would not be representative; and also because the number of people that he recollects could not possibly represent a sample of the opinion of the community.

(Testimony of Orville C. Johnson.)

The Court: Did these people use the word “veracity”?

A. No, sir. We were——

The Court: Or “reputation”?

A. We were talking about Loretta and at the time she was——

The Court: Well, how many of these persons whose names you have given did you talk to yourself?

A. Well, the ones that I have mentioned I have talked to myself, personally, sir.

The Court: All of them?

A. That is correct.

The Court: And that was, as I understand it, between 1949 and 1950?

A. No. Between 1950 and the present. In 1949, sir, I quit my employment with the C.A.A. over at Annette Island and came back to town, in June 1949.

The Court: Well, your motion was predicated, as I understand it, on the fact that his testimony was based on what he heard four years ago?

Mr. Munson: Yes, your Honor.

The Court: But now he says that it isn't.

A. Well, what I am trying to get at, sir, is the time that we had Loretta employed, we missed a few articles, and [394] naturally you hear about——

Mr. Ziegler: Just a minute, Mr. Johnson. The Court hasn't asked you any question.

Q. (By Mr. Munson): Didn't you just tell me a minute or so ago that you made these inquiries

(Testimony of Orville C. Johnson.)

about the time that she was baby sitting for you or shortly thereafter?

A. Yes. That is when people were in doubt about her and so was I, so we got in conversation.

Q. That was about 1950. Now, have you talked to any of these people——

The Court: Well, the testimony is stricken on the ground that it is too remote. This is a young girl who at that time must have been ten years of age.

Mr. Gilmore: May I ask just one more question?

The Court: Yes, you may.

Redirect Examination

Q. (By Mr. Gilmore): Didn't you have conversations——

The Court: You can't ask leading questions now.

Q. (By Mr. Gilmore): Did you have some discussions concerning Loretta's reputation in this community for being a truthful or untruthful person after 1950? 1951, '52, and '53, and up to 1954?

A. I have, and I stated with Mr. and Mrs. Baer.

Q. And was that, some of the discussions, prior to April 24th of this year?

A. That is right.

Q. And still in 1954?

A. That is right.

Mr. Gilmore: No further questions.

Recross Examination

Q. (By Mr. Munson): Mr. Johnson, when were you asked to testify in this case?

(Testimony of Orville C. Johnson.)

A. I talked to Mr. Ziegler and Mr. Gilmore Sunday.

Q. I didn't ask you whether you talked to them. When were you asked to testify?

A. A couple or three days ago.

Q. And are you familiar with the defendant?

A. I have known Blackie a long, long time.

Q. Are you a good friend of his?

A. Yes; I am a very good friend of his. I was in business with him at one time.

Q. Now, didn't you say with reference to Mr. and Mrs. Baer, didn't you tell me just a few minutes ago that you talked to them within the last three or four months?

A. Well, probably in the last few months that we have had our card game, I guess.

Q. I mean about this particular thing, Loretta's truthfulness? [396]

A. Well, our conversation was based on her truthfulness, a conversation that you run across when you are playing cards in a home.

Q. You mean, when you are playing cards in a home, you start discussing things like people's truthfulness and veracity under oath?

A. No; not about her truthfulness under oath.

Q. I mean, isn't it a fact that what you were discussing had to do with something outside of truthfulness; had to do with theft, perhaps?

A. That is right; it did.

Mr. Munson: I renew the motion that his testimony be stricken.

(Testimony of Orville C. Johnson.)

Redirect Examination

Q. (By Mr. Gilmore): Just one question. Didn't it also deal and didn't you also discuss——

The Court: That is a leading question. He is your witness.

Q. (By Mr. Gilmore): Or did you discuss at the same time the question of her truthfulness?

A. Well, we were discussing it back and forth. We had every doubt in the world to believe it.

The Court: Well, the testimony is ordered stricken [397] not only on the ground that it is too remote but that it doesn't constitute general reputation evidence. The jury is instructed to disregard it.

Mr. Gilmore: You may be excused. Thank you, Mr. Johnson.

(Witness excused.)

BILL TATSUDA

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Bill Tatsuda.

Q. How old are you, Bill?

A. Thirty-eight.

Q. Where do you live?

A. 525 Grant Street.

Q. How long have you lived in Ketchikan?

A. All my life.

(Testimony of Bill Tatsuda.)

Q. You were born here? A. Yes.

Q. Do you know Loretta Lindsey?

A. Yes, I do.

Q. Do you know her reputation in this community, in the community of Ketchikan, for truth and veracity? [398]

A. Yes; I think I do.

Q. Is it good or is it bad, Bill?

A. Well, it is not good.

Mr. Gilmore: Take the witness.

Cross Examination

Q. (By Mr. Munson:) Mr. Tatsuda, is your father Mr. Lindsey's bondsman?

A. Yes, he is.

Q. Are you a good friend of Mr. Lindsey's?

A. Yes, I am.

Q. Have you been for a long period of time friends? A. Oh, fifteen years or so.

Q. Who have you discussed Loretta's truthfulness with?

A. I haven't discussed it with anybody. I heard.

Mr. Munson: I move that his testimony be stricken, your Honor.

Redirect Examination

Q. (By Mr. Gilmore): You mean you heard it discussed, Bill?

A. I have heard it discussed; yes.

Mr. Gilmore: That qualifies it. [399]

(Testimony of Bill Tatsuda.)

Recross Examination

Q. (By Mr. Munson): Who have you talked to concerning her reputation——

The Court: Well, in view of his testimony you will have to ask him whom have you heard.

Mr. Gilmore: Yes.

Q. (By Mr. Munson): Who have you heard discuss it?

A. Well, I have heard her brother, Bob Lindsey, and her father, Rollie Lindsey, discuss it.

Q. And who else?

A. I don't know anybody else; I am not sure; but I have heard it other places.

Q. But you can't remember where?

A. But I can't remember when or where.

Q. Can you remember when?

A. Oh, it has been quite a while, I believe.

Q. You mean over a period of years?

A. Oh, it has been the last three years, two years.

Q. The last two or three years. I don't want to repeat this again. I think I misunderstood you. You said that you yourself never talked to someone about her truthfulness?

A. I don't believe I have; no.

Q. It has never been a subject that you were engaged in conversation? A. No. [400]

Q. You just were standing by and heard two other people talking?

A. Well, I was listening. It was on a hunting

(Testimony of Bill Tatsuda.)

trip, and I was right there with them when they were talking.

Q. I see. Was that when Rollie and Bob were on a hunting trip? A. That is right.

Q. And you heard them?

A. That is right.

Q. And you don't remember when that was, do you?

A. Well, it had to be in the fall of 1952.

Q. The fall of 1952. And you don't recall any other conversations that you can distinctly tell me?

A. No, I can't.

Mr. Munson: Your Honor, I move that his testimony be stricken on the ground that it is too remote in time and does not represent a cross section of the community. It represents two people, and one is the defendant.

The Court: The motion is granted, and the testimony is stricken on the ground that it doesn't constitute evidence of general reputation, and the jury is instructed to disregard it.

Mr. Gilmore: Thank you, Bill. You may be excused.

(Witness excused.) [401]

ROBERT E. BAER

called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(Testimony of Robert E. Baer.)

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Robert E. Baer.

Q. And where do you live, Mr. Baer?

A. 527 Revilla Avenue.

Q. Here is Ketchikan?

A. That is right.

Q. How long have you lived here?

A. I came here in 1950.

Q. And do you know Loretta Lindsey?

A. I do.

Q. And how do you happen to know her? What is the nature of your acquaintanceship with her?

A. Well, we hired her as a baby sitter around the first part of this year.

Q. Now, do you know her reputation in this community, her general reputation in this community, for truth and veracity? A. I do.

Q. Is it good or bad, Bob?

A. I wouldn't say it was good.

Mr. Gilmore: Take the witness. [402]

Mr. Ziegler: Did you say you would say it was not good?

A. I would not say it was good.

Cross Examination

Q. (By Mr. Munson): Mr. Baer, when did you say you hired Loretta as a baby sitter?

A. Around the first part of this year; shortly after I got married.

(Testimony of Robert E. Baer.)

Q. And had you made any inquiries about her before you hired her?

A. No; not before we hired her we hadn't.

Q. Now, where did you live at that time?

A. 527 Revilla Avenue.

Q. How many times did she baby-sit for you?

A. Probably four or five times.

Q. Four or five times. Now, you just stated that you know her reputation in the community, and I am going to ask you the same question that I have asked the other witnesses. Who did you talk to?

A. Well, I remember talking specifically to Mr. and Mrs. Johnson.

Q. You mean the man that was first up here?

A. That is right. [403]

Q. Orville or Cal Johnson? A. Yes.

Q. You talked to them?

A. I remember talking to them.

Q. Incidentally, are you a friend of Mr. Johnson's?

A. Oh, I have known Cal since I came to town.

Q. Are you a friend of Mr. Lindsey's?

A. I wouldn't say I was a very close friend of Rollie's. I have known him, is about all.

Q. When were you subpoenaed to appear in this case? A. Well, I was——

Mr. Ziegler: He wasn't subpoenaed.

Q. (By Mr. Munson): Oh, you weren't subpoenaed. You are up here voluntarily; is that right?

A. That is right.

Q. When were you asked to appear?

(Testimony of Robert E. Baer.)

A. Three or four days ago.

Q. Three or four days ago. All right. Now, I will ask you the question I asked the other character witnesses. Who did you talk to? You said Mr. and Mrs. Cal Johnson?

A. I also talked to Larry Pawsey.

Q. And you talked to Larry Pawsey. Now, Larry Pawsey is an uncle of the complaining witness?

A. Yes.

Q. A member of the family? [404]

A. That is right.

Q. And who else did you talk to?

A. Well, those are the only two specific people that I can remember.

Q. Those are the only two that you can recall talking to?

A. That is, specific. I have heard conversation.

Q. Well, who did you hear?

A. Well, I couldn't say. I worked at the V.F.W. Club for quite a while and I have heard conversations back and forth.

Q. Well, when did you hear these conversations?

A. Oh, it has been during this year.

Q. You mean that the subject of Loretta's truthfulness has been a subject matter of the V.F.W. Club?

A. It has been discussed up there; yes.

Q. You mean the case has been discussed up there?

A. At the bar. Well, the case; yes.

Q. And is Mr. Lindsey a member of the Club?

(Testimony of Robert E. Baer.)

A. Yes; Rollie is a member.

Q. He is a member of the V.F.W.?

A. That is right.

Q. When did you talk to Cal and Mrs. Johnson about this case?

A. I can't remember the specific date, but I know it was before Rollie was charged.

Q. It was around the first of the year? [405]

A. Yes, it was.

Q. Didn't you just tell me that you hired her as a baby sitter around the first of the year?

A. That is right.

Q. In other words, you hired her even though you talked to Mr. Johnson about her truthfulness?

A. This was after we had refused to hire her any more, that I talked to Mr. Johnson.

Q. I mean, what you are saying is that Mr. Johnson didn't like her?

A. Well, we had already——

Q. How about Mr. Pawsey?

Mr. Ziegler: Let him answer the question.

A. We had already discharged Loretta as a baby sitter before I talked to Mr. Johnson.

Q. (By Mr. Munson): I know. You already said that. How about Mr. Pawsey?

A. Well, I discussed it with him the day that Rollie was charged.

Q. You discussed it with him that day.

Mr. Munson: I move to strike this testimony as not being reputation evidence, your Honor.

(Testimony of Robert E. Baer.)

Mr. Ziegler: If the Court please, I think all these questions go to the weight of it and not the admissibility.

The Court: It couldn't possibly constitute general [406] reputation if he has only talked to somebody in the family and then somebody whom he doesn't recall. The motion is granted. The testimony is stricken, and the jury is instructed to disregard it.

Mr. Gilmore: That is all, Mr. Baer. Thank you very much.

(Witness excused.)

Mr. Gilmore: If the Court please, except for the announcement that I made just before calling these witnesses, the Government—I mean, the defense now rests its case in chief, subject to questioning Loretta.

The Court: Are you ready to go ahead with your rebuttal?

Mr. Munson: Well, your Honor, I moved a little while ago, or I meant to if I didn't, I meant to recall the defendant to the stand for one question, but I can call him as a rebuttal witness.

The Court: But you can't call him as a rebuttal witness. He is the defendant. You can only recall him for cross examination.

Mr. Munson: I would like to recall the defendant to the stand for one question. [407]

ROLLAND LINDSEY

recalled as a witness in his own behalf, having previously been duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Munson): Mr. Lindsey, I want you to go back in your memory now to a time when your sister-in-law, Florence Dalton, was a baby sitter at your house.

A. I don't remember her baby-sitting at my home. I don't remember.

Q. I will ask you this way then. Could it be—I mean, you just don't remember; this was quite a long time ago—could it be that when Florence was twelve or thirteen years old that she was a baby sitter in your home on a night that you and your wife and possibly Larry Pawsey were out in the evening?

A. How long ago was this supposed to have been now?

Q. Oh, quite a few years ago. Could it have happened?

A. Well, anything, I suppose, could have.

Q. Here is what I want to ask you.

The Court: Well, it makes no difference whether he remembers it or not. You have a right to ask what question you want to ask whether he remembers somebody being present or not, so let's get on with the case.

Q. (By Mr. Munson): Now, that night when you came home did you or did you not get in bed with Florence Dalton? [408]

(Testimony of Rolland Lindsey.)

Mr. Ziegler: Now, if the Court please——

A. I don't remember that.

Mr. Ziegler: Just a moment. We object to that as absolutely immaterial.

Mr. Munson: Your Honor, it is being introduced under the pattern, intent, motive exception that—I mean, this is only an impeaching question, but the evidence which is sought to be elicited is perfectly admissible.

Mr. Ziegler: It is collateral and would open up the whole thing for a trial on another claim that someone——

The Court: For instance, in the present state of the testimony I don't think that—it is just a question of credibility. There isn't any question of intent, and I can't think of any issues in the case that would call for the admission of any evidence, under any of the known exceptions to the hearsay rule or under the rule as to the admissibility of evidence, of other offenses. For instance, where there is a question of intent, a question of knowledge, a question of motive, a question of system, why, evidence of other offenses is admissible, but I just don't see any such situation as that in this case.

Mr. Gilmore: Is that all, Mr. Munson?

Mr. Munson: I am afraid to get into any discussion of this, your Honor, in front of the jury for fear that it may be prejudicial. It is almost 12:00 o'clock. Could we have [409] the jury excused?

(Testimony of Rolland Lindsey.)

Mr. Gilmore: We could finish the trial, if the Court please, probably before noontime and argue it this afternoon. What is the reason for a recess?

The Court: Well, he merely wants a recess to state his position with reference to the admissibility of the offered evidence.

Mr. Gilmore: We could approach the bench.

The Court: Either way is satisfactory.

Mr. Munson: The Government is going to put in rebuttal evidence, so the trial won't be finished by noon.

Mr. Gilmore: We have no rebuttal, if the Court please, except the one question of Loretta.

The Court: Well, but the question of rebuttal or surrebuttal is not before the Court, and it makes no difference. We can't conclude before noon; that is a cinch.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred:

Mr. Munson: Your Honor, I don't think I understand the position of the Court with regard to this evidence. Here is what it is being introduced for. I am trying to lay the impeaching question with a view to bringing into evidence proof of a prior crime, prior offense of the same type, nature, as is found in this case, to show—— [410]

The Court: I understand that.

Mr. Munson: And also I intend to lay the groundwork for a possible hypothetical question.

(Testimony of Rolland Lindsey.)

The Court: You better state what you intend doing so I won't be in the dark about it.

Mr. Munson: I intend to show by medical testimony that a person who, as long ago as ten or twelve years ago, who would make an advance upon a young girl, in this case Florence Dalton, would still have the same mental and psychological pattern now.

Mr. Ziegler: That is collateral.

The Court: That may be, but I think the Court has the duty in admitting evidence of that kind to weigh the prejudice against its logical relevancy and there is involved the policy of excluding evidence if its prejudicial character would outweigh it. I am afraid it is of that character. We will proceed.

Whereupon respective counsel and the court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:

Mr. Munson: That is all, Mr. Lindsey.

Mr. Gilmore: No questions.

(Witness excused.)

The Court: Is there any objection to our resuming at 1:30 this afternoon? [411]

Mr. Gilmore: We have none.

The Court: Would anybody on the jury be inconvenienced? I suppose it would be inconvenient.

Whereupon Court recessed until 1:30 o'clock p.m., November 24, 1954, reconvening as per recess, with all parties present as heretofore and the jury all

present in the box; and the trial proceeded as follows:

The Court: You may proceed.

Plaintiff's Rebuttal

CHARLES L. ANDERSON

called as a witness on behalf of the plaintiff, having previously been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Munson): You have been sworn. Doctor Anderson, do you recall that you were on the stand yesterday? A. I do.

Q. And I asked you if you had any occasion to examine—well, maybe I better refresh the memories of—you stated your qualification, that you are a psychiatrist and a medical doctor; is that correct?

A. I did, yes.

Q. Are there any other psychiatrists in Alaska that you know of, qualified, I mean?

A. There are some in the Air Force, not in civilian practice. There is another qualified psychiatrist in Anchorage who [412] is a woman and is raising her family and is not in practice. I am the only civilian in practice.

Q. The only civilian psychiatrist who is qualified to practice in the Territory in civilian practice?

A. Yes.

Q. Well, Doctor, yesterday I asked you if you had any occasion to make an examination of Lor-

(Testimony of Charles L. Anderson.)

etta Lindsey, the complaining witness in this case?

A. Yes.

Q. And you said you had. Would you tell when you first met her and any subsequent professional relationships you had with her?

A. I first saw her on the 28th of April, 1954. When I came to Ketchikan in October, further information was presented to me, and I ordered a psychological test to be done by my psychologist, James Parsons. That was done on the 6th of October. On the 7th of October I talked to Loretta in the home of Reverend McMaster regarding a test to be done the following day, and on the 8th of October I conducted this test in the General Hospital here.

Q. What kind of test was that?

A. That was a sodium pentothal interview, commonly known as truth serum.

Q. You conducted that test at the Ketchikan General Hospital? A. That is right. [413]

Q. Doctor, would you enlighten me and the Court and members of the jury as to the nature of a test of this kind?

Mr. Ziegler: Now, if the Court please, we object to any testimony of this nature on the ground that it is incompetent, irrelevant and immaterial and it is not scientifically recognized or admissible in evidence in court.

The Court: Well, he hasn't asked the question yet as to the result of the test. He merely asked him to describe the test.

(Testimony of Charles L. Anderson.)

Q. (By Mr. Munson): Would you describe the test, Doctor?

A. Well, in the test we use a drug—well, there are two drugs that can be used, either sodium amytal or sodium pentothal. I use sodium pentothal. It is injected intravenously, that is, right into the vein. It is injected slowly. This drug, sodium pentothal, is an intravenous anesthetic, but used in smaller doses it makes a person sleepy or even asleep but not deeply enough so that it can be considered an anesthetic for operation. Now, under its influence an individual will talk.

Mr. Ziegler: Now, if the Court please, we renew our objection until the Court rules on the question.

The Court: He is merely describing the test at the present time. It is within my ruling.

Q. (By Mr. Munson): Go on, Doctor.

A. An individual will talk and answer questions as though [414] awake. Generally, afterwards the individual doesn't remember what was said.

Q. Now, what is the effect of this drug upon the mind of the person being interviewed?

A. It has its effect first on the highest centers of the mind, and I mean by that the consciousness, and even before that it removes inhibitions. It has an action similar to other anesthetic drug.

Q. Well, how does it get its colloquial name of truth serum? How do you describe that?

A. Well, it gets its name from that because from the very beginning, before the individual is actually asleep, it removes certain inhibitions so the in-

(Testimony of Charles L. Anderson.)

dividual will spontaneously say what the individual would have said without trying to exercise control over not saying it.

Q. You mean it inhibits a person's control over his mind?

A. That is right. You could say it inhibits or removes to a greater or lesser degree the controls over what would be said.

Q. Now, is this sodium pentothal test a recognized test in the field of psychiatry and science?

A. It very definitely is.

Q. And in your opinion as a psychiatrist and medical expert what do you consider its reliability to be?

A. I think it is a highly reliable test when properly used [415] and considering the whole case that you have in mind.

Q. Well, considering this case that we are talking about here, would you say as an expert that a fourteen-year-old girl would be a reliable subject upon which this test would have a great deal of reliability?

A. I would say it does.

Q. Would you explain that?

A. Well, a fourteen-year-old girl is not so experienced in the ways of the world, let's say, more likely to be, more likely to say what would come out. I would say that in a situation such as this it would be a highly reliable test.

Q. Well, Doctor, you made this test and other tests concerning the subject, Loretta Lindsey, upon which to make a medical or a psychiatric determina-

(Testimony of Charles L. Anderson.)

tion of her, of, one, her ability to fabricate, or her motive to lie, and also whether or not the girl was deranged in some manner or another that would prompt her to make charges such as this. Now, was this test, this sodium pentothal test, part of the battery of tests that you used upon which to base your opinion?

A. It was part of the evidence which I used.

Q. Go ahead.

A. It was part of the evidence I used, but not entirely of course. [416]

Q. Now, I am not sure whether the Court and jury are fully informed as to the impact of a test of this kind on this young girl who you have examined and know quite a bit about her emotional make-up, her, perhaps, her intelligence, her sensitivity, her conscience or lack of it. I wish you would go into those areas a little bit for the jury so that they get some idea of how this girl appears to you as a psychiatrist who examined her.

A. Well, naturally, when I first heard the story which the girl told, I wasn't going to swallow that story without some evidence that it was true, because in my work I am constantly hearing stories which I must evaluate to determine whether the individual is telling me something that is a fact or whether he has fabricated it, so I observed this girl as carefully as possible every time I have talked to her, when she first talked to me back on the 28th of April and here in this courtroom and the other times in between, and I noticed that, when

(Testimony of Charles L. Anderson.)

she was discussing material of a nature that would be very embarrassing to her, that she showed appropriate emotion.

Mr. Ziegler: Now, if the Court please, we object to this type of testimony. The eminent doctor is now apparently going to state some opinion of the, as a result of his observations, of the actions and conduct of the girl. Now, that is a matter invading the province of the jury, and, as a [417] psychiatrist, he is in no better position to express an opinion than the jury.

The Court: Well, Doctor, I believe you testified that this test, of the kind that you made on the prosecuting witness, is a test that is recognized in scientific circles and accepted as reliable?

A. That is right.

The Court: Well, I see no objection to the testimony as a result of the test. Objection overruled.

Mr. Ziegler: If the Court will permit us, we certainly renew our objection to the testimony showing any statements that were made or any result of the test as the doctor has described it, because under the law, as we understand it, by the Supreme Court of New Mexico, this type of testimony is not admissible.

The Court: Well, this testimony of course is not going to be substantive evidence. It will merely go to the rehabilitation of the witness or to substantiate, sustain or corroborate the witness. In other words, it is to rebut any inference of impeachment. It is not substantive evidence.

(Testimony of Charles L. Anderson.)

Mr. Ziegler: That is the very reason, as I understand it, that the courts have ruled against the admissibility of the evidence.

The Court: Well, there isn't any doubt, and of course you have to admit, that evidence of previous consistent [418] statements in a situation such as developed in this case are admissible to sustain and corroborate the witness. Now, that is all that this testimony is. It is admissible for the purpose of sustaining or corroborating the witness just as any previous consistent statement would be admissible in this situation.

Mr. Munson: It is also being offered, your Honor, to rebut the charges that this girl is a psychopathic liar and that she is mentally deranged, both of which were raised on the defendant's case, and what I was asking the doctor——

The Court: Well, I have already ruled it is admissible, so go ahead.

Q. (By Mr. Munson): Doctor, what I was trying to get at was how your study of this girl's emotional make-up, sensitivity and conscience would bear on this test; in other words, would this test be more reliable as to her because of what you know about her?

A. Yes. I think it all fits in together.

Q. Would you explain that for a moment?

A. Well, I started to mention that she shows the appropriate emotions that you would expect a girl to show in discussing a situation such as this;

(Testimony of Charles L. Anderson.)

that is, she was embarrassed; she wept. And I would say that a person who—since the term psychopathic personality has been brought up, I think it is appropriate to use it now so the jury will [419] know what that term means. We mean by that an individual who has no conscience. There are people who seem to have no concern at all for their own deeds, and nothing within them tells them they have done wrong. They are only sorry when they get punished or they get hurt for their misdeeds, but there is no conscience within them telling them that they have done wrong, so they usually show no emotion in situations such as this kind. Now, if this girl had come in to see me and told me this story without any apparent emotion, I would have suspected her very much, but she showed the appropriate emotions in telling it. She showed embarrassment, and she cried, and even showed irritation and anger at the appropriate situations, so that lead me to—that helped me to conclude that this girl is not a psychopathic personality.

Q. Would her age also have a bearing on the reliability of this test, her immaturity?

A. Yes. I believe it would be more reliable in an immature person.

Q. Would you tell the Court and jury the details of this test; how you took it; who was there; the general surrounding circumstances?

A. May I go back to the evening before?

Q. Yes.

(Testimony of Charles L. Anderson.)

A. I went to Loretta and said, "I want to give you"—I told [420] her that I wanted to give her a truth serum test. Without hesitation, after I had explained to her that under the influence of this she would not be able to tell a lie, that she would be forced to tell the truth, without hesitation she replied that she would be willing to take it, and, furthermore, she said, "Will Mr. Lindsey take it?" I informed her that I didn't have any knowledge of anything to do about Mr. Lindsey but it would be helpful for her to take it. She readily agreed.

The next day we had the test at the hospital. Those present were the District Attorney, Mrs. Mary Lou Truell, a psychiatric social worker who works with me in the Section of Mental Health, Alaska Department of Health, Loretta Lindsey, myself, and for part of the time James Parsons, a psychologist. Now, I injected the drug into a vein in her right arm slowly and made her sleepy to the point where she was actually very lightly asleep. Then I stopped the injection for the time being and let her awaken enough so that I could talk to her. Now, it was my desire, if possible, to break down her story so I went over this story with her, the story that is essentially what has been told here in court, essentially what she told me the first time, the 28th of April.

Q. Was a recording made of that?

A. A recording was made of that. [421]

Q. Would you recognize that again?

A. I could.

(Testimony of Charles L. Anderson.)

Mr. Munson: Your Honor, I would like to offer into evidence a tape recording of the interview that the doctor has just told about. I am offering it so that the jury and the Court will have an idea of the test that the doctor used to—upon which he has based and will base his expert opinion, and I also offer it as corroboration of an impeached witness by showing a statement consistent with her testimony at a time when she was unable to fabricate and prior to the time of the trial.

The Court: It may be admitted.

Mr. Ziegler: If the Court please, will you hear our objection? We renew our objection to any, under the ruling of the Court, any statements made during a test of this kind. Now, that is my understanding of the law.

The Court: Well, but, unless you have something to add to your previous objection, there is no use of merely repeating it.

Mr. Ziegler: Well, I renew the objection that there is no authority for the admission in court in the trial of this case of statements made by a person under the influence of some drug, sodium pentothal.

The Court: Well, there might not be any authority, but there never will be if the courts don't keep up with [422] science. I think the courts once in a while have to break away from the trodden path, and here is a situation that is very unusual. In the first place, you have offenses charged, which, because of their nature, depend upon the testimony

(Testimony of Charles L. Anderson.)

of the victim exclusively almost, and, after all, this doesn't amount to any more than the proof of prior consistent statements, and, if this were not done by means of a truth serum test, it would be admissible under all the authorities to sustain and corroborate the witness, so the objection is overruled.

Mr. Ziegler: I understand the Court's ruling, but does the Court understand my objection, I wonder. Now, if the Court please, could I be permitted to ask the doctor some questions now before this goes on?

The Court: Yes; if you think that they go to the——

Mr. Ziegler: For the purpose of my objection.

The Court: If you think it goes to the admissibility of this recording, otherwise——

Mr. Ziegler: I think it does. It could be passed upon when the questions are asked.

The Court: In other words, it must not be cross examination. It must be a preliminary examination, so to speak, as to the qualifications or something that goes directly to the admissibility of the recording.

Mr. Ziegler: Well, if the Court please, as I understand [423] the doctor's position, he stated that as part of the basis of his test he observed the conduct of the witness, her manifestations of sorrow and other emotions. As I understand it, he is basing it on those facts. Now, I want to ask if certain other conditions existed. In other words, he assumes that the girl is inexperienced in the ways of the

(Testimony of Charles L. Anderson.)

world and it is entirely on that assumption. If that is an erroneous assumption——

The Court: I don't think that that is a correct summation of the witness' testimony. It isn't based on those observations alone, so that, if that is all that you want to ask him, I think you will have to wait until cross examination.

Whereupon the tape recording was run off as follows, with questions by Doctor Anderson and answers by Loretta Lindsey:

Q. O.K., Loretta. Loretta, can you hear me?

A. Yes.

Q. Now, I want to ask you this. You have talked about Mr. Lindsey, haven't you? A. Yes.

Q. Now, who is Mr. Lindsey?

A. My adopted father.

Q. O.K.

(Playing of tape recording suspended.) [424]

Mr. Munson: Is that the interview at the beginning as you remember it?

Doctor Anderson: That is right.

The Court: I think you should put it on the table there in front of the jury and not have it so loud.

Mr. Munson: I have only got a small lead.

The Court: Oh.

(Playing of tape recording resumed.)

Q. (By Doctor Anderson): And is he the husband of your aunt who adopted you; is that right?

A. (By Loretta Lindsey): Yes.

Q. Did Mr. Lindsey adopt you or did Mrs. Lindsey only adopt you? A. They both.

(Testimony of Charles L. Anderson.)

Q. They both adopted you? A. Yes.

Q. And he is your uncle by marriage before he adopted you? A. Yes.

Q. That is right. Now, you have said some things about Mr. Lindsey that has caused some concern; is that right? A. Yes.

Q. Now, what about that? You have said some things about him, and then you have changed your story a little bit; do you recall doing that?

A. Yes. [425]

Q. Now, did Mr. Lindsey have sexual intercourse with you? A. Yes.

Q. Did he do it very often?

A. Whenever he was home.

Q. How old were you when he first started this kind of thing? A. About nine, I guess.

Q. And did he actually have intercourse with you when you were nine? A. No.

Q. What did he do then?

A. Well, he—he——

Q. When you were nine what did he do?

A. He called up my Mom and told me to bring something down to the boat to him, and——

Q. This is the first time now? A. Yes.

Q. Yes; all right.

A. And then he sent my brother Bob away when I got there and he took the boat off and drifted it out into the bay.

Q. This was in Ketchikan? A. Yes.

Q. And you were nine years old?

A. Yes.

(Testimony of Charles L. Anderson.)

Q. And when the boat was drifting in the bay what did he do?

A. Well, he told me to go downstairs, and so I did, and then [426] he came downstairs with some lard in his hand and he put that on his, oh, I guess you would call it, penis, and he put it on there; I don't know why; but he told me to lay down, so I did what he said to do, and then he got on top of me.

Q. Did you have your clothes on?

A. Part of them.

Q. Did he take them off, or did you?

A. No. He did.

Q. And when he got on top of you, what did he do?

A. He put his penis into my private part of my body, and it wouldn't go, and he kept on trying to force it to go, and I screamed.

Q. Did it hurt? A. Yeah.

Q. Did he ever get it in?

A. Not when he first tried.

Q. Not that time? A. No.

Q. How long—how much later was it that he first got his penis in?

A. Well, the first time he really got it in was when my mother went to the hospital.

Q. This is your adopted mother?

A. Yes. [427] A. Yes.

Q. Yes. She went to the hospital?

A. Yes.

Q. For what? A. To have a baby.

(Testimony of Charles L. Anderson.)

Q. Was that her first baby?

A. Yes, it was.

Q. What was the date of that? Do you remember the date?

A. October 22nd. He will be three this year, so it was about three years ago.

Q. Three years ago October 22nd. What year would that be then? A. 1951, I guess.

Q. 1951. That was the first time he ever got in?

A. Yes.

Q. How old were you then?

A. I was twelve.

Q. You were twelve. Had you started having periods then? A. Yes.

Q. Had you developed as a woman by that time?

A. I guess you would say that.

Q. You have told Mr. Munson about this first time before, have you? A. Yes, I have.

Q. Now, he was able to get inside that time?

A. Yes.

Q. Did it hurt?

A. Yes, it did, very much.

Q. Did it make you bleed any? A. No.

Q. Now, are you telling us exactly what happened? A. Yes, I am.

Q. Now, why are you telling this?

A. Because I can't take any longer what he was doing to me and to help my sister so she won't have to go through the same thing I have gone through.

Q. Where is your sister?

A. She is home.

(Testimony of Charles L. Anderson.)

Q. Does she live with the Lindseys?

A. Yes.

Q. How old is your sister?

A. She will be two this coming November.

Q. Two? A. Yes.

Q. Well, now you said a baby was born three years ago?

A. That was my little brother.

Q. Oh, that was your little brother?

A. Yes.

Q. Now, then, your sister is almost two?

A. Yes. [429]

Q. Now, is this your sister, your full-blood sister? A. No. She is actually my cousin.

Q. She is actually your cousin? A. Yes.

Q. And she is also your adoptive sister; is that correct? A. Yes.

Q. Now, Loretta, why did you later change your story and tell your father, your adoptive father, that this wasn't so?

A. Well, he knew it was so, but I wanted to do that to help my Mom and the kids.

Q. What do you mean by that?

A. Well, they would have lost their Mom and Dad and things and so——

Q. Would they have lost their Mom?

A. Yes.

Q. How would they have lost their Mom?

A. By having Mr. Lindsey sent away.

Q. Would that be their Mom or their Pop?

A. And her husband and the kids' Dad.

(Testimony of Charles L. Anderson.)

Q. Oh, I see. You felt sorry for Mrs. Lindsey and the kids? A. Yes.

Q. Well, didn't you go to a lawyer with Mr. Lindsey and swear that the story wasn't true?

A. Yes. [430]

Q. Now, why did you do that?

A. Because I, because I had to do it because——

Q. You had to? A. Yes.

Q. What do you mean, you "had to"?

A. Well, because my Mom is actually my aunt, and I didn't want to hurt her or the kids.

Q. Oh, you didn't want to hurt her or the kids?

A. Yes.

Q. When you went to the lawyer, you went there with your foster father, didn't you?

A. Yes.

Q. With Mr. Lindsey? A. Yes.

Q. When you went there, were you telling the truth or were you telling a lie?

A. I was lying.

Q. You were lying. And you said you were lying to protect them? A. Yes.

Q. Now, then, later you talked to Mr. Munson again, didn't you? A. Yes.

Q. And did you tell him the truth or a lie?

A. The truth. [431]

Q. The truth. Do you remember when you saw me in April of this year? A. Yes.

Q. Do you remember when you came and talked to me? A. Yes.

Q. Were you telling me the truth then?

(Testimony of Charles L. Anderson.)

A. Yes.

Q. Do you remember talking to Mr. Parsons a few days ago, this week? A. Yes.

Q. And he gave you some tests and had you tell some stories? A. Yes.

Q. Were you telling him the truth?

A. Yes.

Q. Now, are you telling us the truth now?

A. Yes.

Q. Now, then, the truth is what? Is it the truth that Mr. Lindsey did all these things with you?

A. Yes, it is.

Q. How many times can you remember actual dates? You mentioned October 22, 1951, didn't you?

A. Yes.

Q. What happened on October 22, 1951? Did he have intercourse with you on that date? Loretta? Loretta? Can you hear me? [432] A. Yes.

Q. Are you sleepy? A. Yes.

Q. Are you real sleepy? A. Yes.

Q. Can you tell me what happened on October 22, 1951? A. October 22nd?

Q. 1951.

A. That was when my little brother Randy was born.

Q. What did Mr. Lindsey do then?

A. He told me to stay home and do the wash for him in the afternoon because we had about a half a clothes full of dirty clothes.

Q. Was this on October 22, 1951? A. Yes.

(Testimony of Charles L. Anderson.)

Q. Was this the time he took you on the boat?

A. No. It happened at the house.

Q. Oh, this happened at the house, the first time he succeeded with you? A. Yes.

Q. You mean, the first time he got his penis into you? A. Yes.

Q. He did that in the house? A. Yes.

Q. The boat time was when you were nine years old? [433] A. Yes.

Q. Did he do anything in between those times, the first time on the boat and then this time on October 22, 1951; did he fool around with you at all in between? A. Yes.

Q. Very many times? A. A lot of times.

Q. And what did he do to you?

A. Well, he tried intercourse a lot more times in between.

Q. And didn't succeed?

A. Yes; and then he used his tongue and his fingers.

Q. On you?

A. Yes; and he stuck his penis in my mouth.

Q. Did he do that very many times?

A. Yes, he did.

Q. Then, can you remember any other exact dates when he had intercourse with you?

A. Besides the one I just gave you?

Q. Yes; besides this October 22, 1951, date. Any since then; and the dates since then you can remember? A. Two other ones.

Q. What are those dates?

(Testimony of Charles L. Anderson.)

A. October 22, 1952, and February 27, 1953.

Q. How do you remember those dates?

A. Because my mother went to the hospital.

Mr. Munson: Loretta, don't you mean February 27, 1954? Wasn't it this year? Do you remember that date? A. Yes.

Q. (By Dr. Anderson): February 27, 1954?

A. Yes.

Q. And what was the date of the second baby?

A. The date?

Q. The date it was born, the second baby?

A. February 27th.

Mr. Munson: That is the third baby.

Q. (By Doctor Anderson): Is that the third baby? A. Yes.

Q. What about the second baby?

A. The second baby?

Mr. Munson: Your sister.

Q. (By Doctor Anderson): Your little sister; what is that date?

A. Well, she went to the hospital and had her, had my little sister Janice.

Q. What was the date for that?

A. October 23, 1952.

Q. She had one in 1951, another one a year and a day later in 1952, and then a little over a year later the next one comes in 1954; is that right?

A. A year and forty-five minutes. [435]

Q. A year and forty-five minutes; just over the line? A. Yes.

Q. Well, now, that means every time your step-

(Testimony of Charles L. Anderson.)

mother, not step-mother, but your foster mother, went to the hospital this foster father of yours had intercourse with you? A. Yes.

Q. Did he do it other times too?

A. Yes; but I can't remember the specific dates.

Q. Oh, that is why. Well, now, how often did it happen? A. Specific dates, or not?

Q. No. I mean, not specific dates, but just as you went along there living with him, how often did he have intercourse with you?

A. Whenever he came home.

Q. Well, how often would that be?

A. Oh, once every two weeks, or two times every two weeks.

Q. So he had it every week or every two weeks? Can you hold still, Loretta? Now, why did you decide to go back and tell the same story again, Loretta? What is the matter? Loretta? Are you awake? What is the trouble, Loretta?

A. I don't feel awake.

Q. You don't feel what? A. I don't feel awake.

Q. You don't feel awake? Do you feel sleepy?

A. Yes. [436]

Q. Why are you crying?

A. Something is hurting.

Q. Where does it hurt? A. I don't know.
(Pause—no recording audible.)

Q. You are not crying because of what you have told us, are you? A. No.

Q. Where does it hurt?

A. It doesn't hurt any more.

(Testimony of Charles L. Anderson.)

Q. It doesn't hurt any more now? A. No.

Q. That was the needle that was hurting; see; that needle I stuck in your arm. It has stopped hurting now? A. Yes.

Q. Why did you decide to tell Mr. Munson the truth again?

A. Because Mr. Lindsey told me that he didn't know if he could control himself after I came home.

Q. You mean he tried to do it to you again?

A. Yes.

Q. Did you like that idea? A. No.

Q. You didn't like it? A. No.

Q. So you—is that the only reason you decided to tell the [437] truth again? A. No.

Q. What other reasons?

A. He told me right in front of my Mom and my Gram, because the doctor said I had actual intercourse with someone, and he said to say that I just stuck a banana or something up me.

Q. Did you like that suggestion?

A. No. And I couldn't see how my Mom or my Gram could believe somebody that would say that.

Q. Now, I think last night you told me that he tried the same sort of thing with somebody else?

Mr. Ziegler: (Interposing during the playing of the recording.) Now, if the Court please, just a moment.

A. I couldn't be positively sure, but, I mean, oh, yeah, on that one I could.

(Playing of recording suspended.)

(Testimony of Charles L. Anderson.)

Mr. Ziegler: Just a moment. That part of it the Court has ruled on.

The Court: That part of it is within the Court's ruling.

Whereupon the volume was turned down so the recording was inaudible; and thereafter the playing of the recording was resumed as follows:

Q. (By Doctor Anderson): Why didn't you tell about Mr. Lindsey [438] before you really did tell about him? Why didn't you tell earlier?

A. Because I didn't know who to go to or what to tell anybody because my cousin Faye said (volume again turned down so recording inaudible)—and nobody believed her.

Your cousin Faye—Faye who?

(Volume again turned down so recording inaudible.)

Q. Were you scared to tell? A. Yes.

Q. Then what made you finally decide to tell?

A. Because he hit me a lot of times.

Q. Is that the only reason, because he hit you?

A. And because I just couldn't take it any more.

Q. Now, who was the first person you told?

A. The first person I told was Mr. and Mrs. Don Riewold.

Mr. Munson: Are you sure it wasn't Arleen Field?

A. Well, I told her before then, but those were the grownups.

Mr. Munson: Oh.

Q. (By Doctor Anderson): The first grownups?

(Testimony of Charles L. Anderson.)

A. Yes.

Q. Then did you tell other people too?

A. Yes. I told my brother Bob about it.

Q. Did you tell any policemen about it?

A. No. My brother did that.

Q. Your brother did that? [439] A. Yes.

Q. And you told them because you were tired of the whole situation? A. Yes.

Q. Have you been telling us the truth all the time while we have been talking to you here?

A. Yes.

Q. Are you still sleepy? A. Yes.

Q. Oh, let me ask you this, Loretta. Did you enjoy these experiences with your uncle?

A. No.

Q. No. Now, I would like to ask you one thing else. You told Mr. Munson that your uncle used to put his penis in your mouth and then have intercourse with you, and you told me that he would have intercourse with you and then after he lost his erection then he would put it in your mouth. Now, which way did it happen?

A. He did both, but he didn't put his penis in my mouth after he had intercourse with me as much as he did, as he put it in before.

Q. He did it more before than after?

A. Yes. He usually did that when he used the rubber.

Q. In addition to putting his penis in your mouth, did he ever put his mouth on your sexual organs? [440] A. Yes, he did.

(Testimony of Charles L. Anderson.)

Q. Which did he do oftener?

A. His penis in my mouth.

Q. He did that more than putting his mouth on your sexual organs? A. Yes.

Q. Did he use his tongue on your organs?

A. Yes, he did, and his finger once in a while.

Q. Did he seem to enjoy it?

A. I guess he did.

Q. Did you enjoy it?

A. Not very often.

Q. Usually not? A. Yes.

Q. Now, did he do something like this every time he had intercourse with you?

A. Yes, he did.

Q. One or other of those things first?

A. Yes.

Q. And then intercourse? A. Yes.

Q. And once in a while afterwards?

A. Yes.

Q. Did the fluid ever go into your mouth?

A. It did that practically every time he put his penis in my [441] mouth.

Q. Then after he had the fluid go in your mouth, then he would have intercourse with you?

A. No. I mean, when—after—I mean sometimes I would be menstruating, and he would put his penis in my mouth because I couldn't have intercourse with him.

Q. Oh.

A. And he would let it go then, and, even sometimes when I wasn't, he would, but, when he had

(Testimony of Charles L. Anderson.)

intercourse, he would usually make me—he would put his penis in my mouth and make me lick it so he could put the rubber on it.

Q. Oh, he would do that first? A. Yes.

Q. Did he always use a rubber?

A. Not always.

Q. Did he usually use a rubber?

A. I guess you would say that; yes.

Q. When he didn't use a rubber, what did you do?

A. Well, he usually let that stuff go into me, and right afterwards I would go into the bathroom and wash out as best I could.

Q. What did you use to wash out?

A. Oh, one of those——

Q. Did you have a syringe?

A. Yes; I guess you would call it that. [442]

Q. You would wash it out quick so you wouldn't get pregnant? A. Yes.

Q. Were you afraid you might get pregnant?

A. Yes, I was.

Q. Did he ever say anything about the possibility that you would get pregnant?

A. No.

(Playing of the tape recording concluded, and Direct Examination of Doctor Anderson was continued by Mr. Munson as follows:)

Q. (By Mr. Munson): Was that the accurate transcription of the interview as you remember it, Doctor?

A. (By Doctor Anderson): Yes, it was.

(Testimony of Charles L. Anderson.)

Q. And on the basis of that sodium pentothal interview plus the battery of psychological tests and personal tests, observations by you, that you base your expert opinion upon? A. That is right.

Q. Now, I would like to ask you, Doctor, as a psychiatrist and as an expert witness, whether in your opinion this girl is a fabricator or a liar?

A. I don't believe she is.

Q. Do you believe that this girl is mentally deranged in any way? A. I do not. [443]

Q. Do you believe that she is, considering the circumstances under which she has lived, would you say that she is an emotionally normal, healthy, young girl of fourteen or fifteen?

A. As much as she could be under those circumstances.

Q. Would you now give a short resume of what your evaluation of this girl is and the scientific bases for your opinion?

Mr. Gilmore: We object, if the Court please. The question is too broad and vague and unintelligible.

Q. (By Mr. Munson): With reference to her mental normalcy and whether or not she is a fabricator?

Mr. Gilmore: If the Court please, I object to that upon the ground that it is repetitious. The question has been asked, and it has been answered, the same question. It is purely repetitious.

Q. (By Mr. Munson): Now, there is one further question that I would like to ask you as an expert and that is, in your opinion whether it would

(Testimony of Charles L. Anderson.)

be possible for a young girl to have made up a story of this kind with the mass of detail——

The Court: It would have to be this girl, not some other girl.

Mr. Ziegler: We object to that, if the Court please.

The Court: Objection overruled.

Q. (By Mr. Munson): Whether this girl could have fabricated a story with this enormous amount of detail of intimate knowledge of sexual matters?

A. It is inconceivable to me that she could have gained this information except from personal experience.

Mr. Munson: That is all.

Cross Examination

Q. (By Mr. Ziegler): Doctor, before you commenced this test, did you tell her what you proposed to do?

A. Yes. The evening before I explained to her the nature of the test and why I wanted to do it.

Q. She knew when she undertook to take this test that you were going to ask her certain questions?

A. I didn't tell her the questions that I would ask, but I did tell her that I was going to give her this test to see if she would tell the truth under the test, to see—I will say it differently—to tell whether she would tell the same story under the influence of the drug as she had before.

Q. Well, now, what story were you referring

(Testimony of Charles L. Anderson.)

to? The one she told the first time, or the second time?

A. Well, the story that I was referring to then was the story that she had told me the 28th of April this year.

Q. And you told her that was the story that you were going to ask her about and see if she would tell the same story? [445]

A. Also I told her that I knew she had told a different story to the attorneys and it was my purpose to find out which story was the truth.

Q. And, well, did she have any idea that you were attempting to verify the second story when she repudiated the first?

A. I don't quite get what you mean there.

Q. Well, which story did she understand, which statement did she understand that you were trying to establish as the truth?

A. I told her in essence this: "There are two stories here. I want to find out which story is true. Under the influence of this drug you are bound to tell me the truth, and I will know which one of these stories you have told me is true and which one isn't true."

Q. Well, Doctor, are you telling this jury now that a person who is under the influence of this drug is bound to tell the truth?

A. I would say that a girl her age and in her condition is bound to tell the truth.

Q. Are you willing to swear to that in this case?

A. That is my professional opinion.

(Testimony of Charles L. Anderson.)

The Court: He has taken the oath here. The question is superfluous.

Q. (By Mr. Ziegler): That is only an opinion of yours? As I understand it, that is only an opinion of yours that a [446] person would tell the truth?

A. My opinion based on some years of experience in this thing.

Q. How many years' experience?

A. Since 1941.

Q. And how many tests of this nature have you given?

A. I have never counted them, but I have given them since 1941, several of them a year.

Q. How is that?

A. Several every year since 1941, I would think.

Q. Did you ever give a test on a girl of this age before?

A. Yes. I have given them on them at her age and older and, I suppose, all ages.

Q. Now, as I understand it, in your answer to Mr. Munson you said you observed her demeanor on the stand here and where she showed emotion of sorrow and so on and so forth. That was one of the preliminary questions you were asked?

A. That is correct.

Q. Did you also observe her laughing, when you were sitting over there, when her testimony was given?

A. I have watched her as much as possible throughout the trial and looked at her frequently.

(Testimony of Charles L. Anderson.)

Q. Did you see her laughing?

A. I think I have seen her laughing, and I think I have seen her show anger. I think I have seen most of the emotions that one would go through.

Q. Now, Doctor, did you know at the time you gave this test that she had accused Mr. Krepps in Wrangell of this same thing?

A. Yes; that information had been supplied me.

Q. Well, why didn't you in giving this test ask her about that?

A. Frankly, it slipped my mind when I was testing her.

Q. Is it true, Doctor, that the object in your test in this case was to rehabilitate her story, that is, to establish the fact from an opinion standpoint that her story which she originally told was true? Was that your object?

A. No; that was not my object.

Q. What was your object?

A. My object was to find out whether or not it was true. If she had told an entirely different story under the influence of the drug, I would have reported accordingly to the D.A.

Q. Who was present when that was taken?

A. I mentioned, besides Loretta and myself, Mr. Munson was present, and Mrs. Mary Lou Truell, Psychiatric Social Worker, who works with me, and for a part of the interview Mr. James Parsons, who is a Clinical Psychologist.

Q. Did I recognize Mr. Munson asking her some questions there?

(Testimony of Charles L. Anderson.)

A. I think you did toward the end there, one or two questions.

Q. Would it have been regular if you had permitted the [448] defendant's attorneys to be present during the taking of this test?

A. That is a legal point on which I haven't any opinion.

Mr. Munson: I object, your Honor.

Mr. Ziegler: I am not asking from a legal standpoint.

The Court: I suppose he would be willing to make the test for anybody who asked him.

Mr. Ziegler: We never knew the test was made or going to be made, your Honor.

The Court: You have, you might say, accessibility to psychiatrists like anybody else.

Mr. Ziegler: Yes; but we are certainly not duty bound to do so.

The Court: Well, you don't have to, no; but, I say, if you wanted to, why, you could.

Mr. Ziegler: Well, did the Court rule out the question?

The Court: I don't know what the question is.

Mr. Ziegler: The answer?

The Court: What is the question?

Court Reporter: The last question was answered.

Mr. Ziegler: The question was——

The Court: Well, if it is answered, why, that is all there is. There is nothing before the Court.

Mr. Ziegler: I would like to get the answer, because then we started talking about it.

(Testimony of Charles L. Anderson.)

Court Reporter: A. "That is a legal point on which I haven't any opinion."

Q. (By Mr. Ziegler): Well, with reference to the propriety of it, Doctor, have you an opinion?

A. Isn't that the same as the question I just answered? I think that was the same question.

Q. Well, have you conducted tests of this kind in similar cases before?

A. I have conducted similar tests—I don't believe ever with the District Attorney present; but I wouldn't have been unwilling to have the defense attorneys there too, as far as that goes.

Q. Well, the test is finished now of course.

A. Well, there was no unwillingness on my part.

Q. All right.

Mr. Munson: Your Honor, I object to this.

The Court: I have already said that either side can employ a psychiatrist for the purpose of making a test of this kind. No one has got a monopoly on psychiatrists.

Mr. Ziegler: Well, they are very scarce in Alaska. There is only one, your Honor, and it would be pretty hard for us to get this psychiatrist away from Mr. Munson.

The Court: Well, I don't know that there is only one. [450]

Mr. Ziegler: Well, he testified so.

Mr. Munson: Well, your Honor—

The Court: Well, there are places besides Alaska. There is Seattle here, closer than Anchorage. An-

(Testimony of Charles L. Anderson.)

chorage is about nine hundred miles away from here.

Mr. Ziegler: There are some all over the States, as I understand it, too.

The Court: They are available for anybody who wants to employ them.

Q. (By Mr. Ziegler): Doctor, as I understand it from what has occurred here, the patient, Loretta, was in a sort of a twilight zone between consciousness and semi-consciousness?

A. That is correct.

Q. And you aimed to keep her in that condition?

A. Correct.

Q. Does that same condition exist from the administration of other drugs? I mean, can you keep a person in that condition you have just described by the use of other drugs?

A. With some drugs it is rather hard to do it because they will get, you know, either one side or the other of that state; but, with this drug, it is about the easiest drug to maintain that state.

Q. Well, is there any difference in the effect on the person by the use of other drugs? [451]

A. You could use ether, for example. It would be difficult to administer and hold them there, but it could be done.

Q. And you have heard people talking under ether?

A. Certainly I have.

Q. And they make a lot of funny statements, don't they?

(Testimony of Charles L. Anderson.)

A. Not always so funny, if you listen carefully to what they are talking about.

Q. I have had it myself and I know that——

A. Do you remember it?

Q. ——I was going to lick Jack Johnson.

The Court: Well, we are not here to listen to any colloquy now of that kind. We have wasted enough time here.

Q. (By Mr. Ziegler): Now, on this sodium pentothal, it affects a person physically and mentally at the same time; is that it? Do I understand that to be true? A. That is right.

Q. Now, as I recall your testimony, your opinion is this, that Loretta is not a fabricator?

A. I think my opinion was that she couldn't fabricate such a complicated story dealing with sexual matters.

Q. Do you mean to say that it would be impossible for her to have learned all these things by associating with other children, other boys, and her brother?

A. I don't believe that anybody could tell such a detailed account without having gone through with it themselves. [452]

Q. That is another opinion only?

A. My opinion; yes.

Q. Doctor, I will show you a letter in connection with your testimony and ask you to read it, a letter from Loretta addressed to "My dearest Sharon", dated March 26, 1954. I will ask you to read it before I ask you any questions about it.

(Testimony of Charles L. Anderson.)

A. (Reading document to himself.)

Q. Now, Doctor, in answer to Mr. Munson's question you stated that in your opinion Loretta is not a psychopath? A. I did; yes.

Q. After reading this letter, would you still adhere to that opinion?

The Court: Well, now, wait a minute. Who has identified that letter? I want to make sure we don't run off afield again like we have been doing throughout this trial.

Mr. Ziegler: I stated, your Honor, that it is a letter addressed to "My dearest Sharon", at least, if I didn't, I will so state, and signed——

The Court: But how has it been authenticated here or identified? It isn't in evidence.

Mr. Ziegler: Well, we will offer it in evidence and have it marked for the purpose of using it in cross-examining the witness.

The Court: It will be excluded. This witness' [453] testimony is based on the test that he made, which is before the jury, and on nothing else.

Mr. Ziegler: Well, he is assuming certain things from that test, your Honor, and from his discussion with her and has made a positive statement of his opinion with reference to the psychopathic tendency or condition of Loretta. Now, I think we should be permitted to cross examine him.

The Court: Cross examine him on his opinion as to her psychopathic condition, if any.

Mr. Ziegler: He based it on assumption of cer-

(Testimony of Charles L. Anderson.)

tain facts. Now, your Honor, if we can show other facts——

The Court: What facts did he base it on?

Mr. Ziegler: Her conduct, his tests, his discussion with her, and examination.

The Court: All right. Now you can cross examine him with reference to all those things to which he has testified.

Q. (By Mr. Ziegler): Let me ask you this question, Doctor. Assuming that on March 26, 1954, Loretta wrote a letter addressed to a girl in which she indicated herself that she was possessed or acted in an unnatural manner, now, would that affect your opinion with reference to her being psychopathic?

The Court: Never mind answering that question. I have already said that this letter, not being in evidence, [454] cannot be used for the purpose of such examination.

Mr. Ziegler: Well, if the Court please, we never could introduce this letter in evidence until this situation arose.

The Court: Why, anybody could produce a letter from somewhere, and, without having it authenticated, without having anyone assume the responsibility of authorship or anything else, why, the examination could be endless.

Mr. Ziegler: Well, if the Court please, I will ask permission to call a witness and have the letter identified.

(Testimony of Charles L. Anderson.)

The Court: The motion is denied. It is not proper cross examination of this witness.

Q. (By Mr. Ziegler): Well, Doctor, as I understand it, then you base your opinion in this matter on facts that are known to you? A. Yes.

Q. Is it true that other facts could exist which would entirely change your opinion?

A. It would have to depend on the nature of those facts.

Q. Is it possible to have existent such facts that would change your opinion?

A. This is going to be hard for me to answer that, because I know the facts you have in mind and I can't answer on that.

Mr. Munson: Your Honor, we have no objection to [455] the Doctor answering the question on the basis of what he read in that letter. They have thrown such a cloud on——

The Court: Well, I am concerned with the length of time this case is consuming.

Mr. Munson: Yes, your Honor. The Government just feels that——

The Court: This witness has testified, has given his opinion on the basis of what he observed with reference to the witness Loretta Lindsey and his questioning of her and nothing else, and, since he hasn't testified that his opinion is based on anything else, the cross examination as to anything else is improper, outside the scope of direct examination.

Mr. Ziegler: Well, if the Court please, then I

(Testimony of Charles L. Anderson.)

certainly don't see, if he is basing his testimony on opinions from what he observes, I don't see the necessity of taking all this time here in the court to run off this record.

The Court: Why not?

Mr. Munson: That was my purpose, of giving the jury an idea of what it was based on.

The Court: If once that it is permitted to sustain or corroborate a witness, you have got to put in the previous consistent statements. You can't just have somebody sum up the whole thing by saying, "Well, she made consistent statements before". The statements themselves have got to go into evidence. You can go fully into what his opinion is based on [456] without limit but you can't introduce something from the outside any more than you could a book for cross examination unless he said his opinion was based on such a book.

Mr. Ziegler: Well, I thought, your Honor, we would be entitled, if we could, to show facts which might alter the very opinion he has given in court here.

The Court: Well, if they are facts concerning this witness that came under his observation or were presumed to come under his observation in connection with making this test, why, that would all be proper cross examination.

Mr. Ziegler: It is perfectly obvious that anything of this nature wouldn't be before him on which he based his opinion in the first instance.

The Court: Well, then, it can't be cross examin-

(Testimony of Charles L. Anderson.)

ation any more than cross examination from some book by a psychiatrist upon whose book he doesn't base his opinion.

Q. (By Mr. Ziegler): Now, Doctor, you stated, as I understand it, you were impressed with and based your opinion on her demeanor and conduct here in court and the times you have seen her. Now, assuming to be a fact that, when she related to other witnesses the accusation of Mr. Krepps at Wrangell, she told it in a very jocular and laughing manner, would that have any bearing on the opinion you have now expressed?

A. It has some bearing, but it wouldn't alter my opinion. [457]

Q. It wouldn't alter it? A. No.

Q. This sodium pentothal is an ordinary anesthetic used in the hospitals all the time; it is an ordinary anesthetic? A. Yes.

Q. And do I understand that it has any more particular virtue or power in ascertaining the truth than any other drug?

A. It is largely because of its convenience of use in maintaining the individual at the right level between consciousness and unconsciousness.

Q. And that is the only additional property it has? A. That is right.

Mr. Ziegler: I think that is all, if the Court please.

The Court: Are you through with this witness?

Mr. Munson: Excuse me, your Honor.

(Testimony of Charles L. Anderson.)

Redirect Examination

Q. (By Mr. Munson): Doctor Anderson, the week that you came down here or at the time that you made this test, that interview that was just related, what were you doing down here in Ketchikan that week; do you remember?

Mr. Gilmore: We object, if the Court please. It [458] doesn't appear to be proper redirect examination.

The Court: Well, it isn't, standing alone. I suppose it is preliminary. It would certainly be nonsensical if it wasn't.

Mr. Munson: Well, your Honor, I don't know whether the remarks that were flying around between the Court and counsel were fully appreciated. I was just going to show or to try to show that Doctor Anderson——

Mr. Gilmore: Well, now he will be testifying.

Mr. Munson: Well, counsel for the defense was doing some testifying about the unavailability of this psychiatrist and I just wanted to bring out——

The Court: Well, I have already ruled that the District Attorney's Office has no monopoly on psychiatrists and that any party can employ a psychiatrist if he wishes.

Mr. Munson: I have no further examination.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box, and the trial proceeded as follows:

Mr. Munson: Your Honor, I would like to clarify the status of this tape recorder. I would like to have it available to the jury in case they should want it played back during its deliberations.

The Court: Well, you mean, take it in with them [459] in the jury room? It is available the same way that any testimony is, but that is the only way in which it would be available. It can't be made any more so. It can't be singled out from all the rest of the testimony and given a preferential status.

Mr. Munson: No; I didn't mean to give it a preferential status, your Honor.

The Court: It will be available, equally available, with the rest of the evidence. Have you any more rebuttal witnesses?

Mr. Munson: No, your Honor. I believe the Government rests its rebuttal case.

Mr. Ziegler: If the Court please, at this stage of the proceeding the situation has developed where this testimony is in the nature of a surprise. We knew nothing about it, and of course are entitled to time to produce evidence from other sources, that is, from doctors, local doctors, concerning the use of this drug, and it is such an important matter we feel that we certainly are entitled to a continuance of the case for that purpose.

The Court: Well, how much continuance do you want?

Mr. Ziegler: Well, we couldn't do it today and finish the case, your Honor, and——

The Court: You can consult them and find out

what their opinions are in one hour. We will take a recess for [460] one hour but no more.

Mr. Ziegler: Well, if the Court please, in addition to that I want to state to the Court right now and to the District Attorney——

Mr. Munson: Your Honor, I am afraid that what Mr. Ziegler is going to say I would prefer to have said up at the bench.

The Court: Well, I don't know what it is going to be, but I presume——

Mr. Munson: I don't want to object after it is already out, your Honor, because I think——

The Court: Well, I presume counsel is not going to state anything that is improper.

Mr. Ziegler: I think it is very proper in view of the——

The Court: I mean in the presence of the jury.

Mr. Ziegler: ——in view of the testimony that has now occurred, taken place, and that is this, your Honor, that the defendant now offers to submit himself to a truth serum test. He not only offers it but he demands it and will pay Doctor Anderson and his staff the necessary expenses to have it done.

The Court: Well, evidently, that is a matter of afterthought.

Mr. Ziegler: It isn't an afterthought. We never [461] knew about this, your Honor.

The Court: Why, you knew about it as much as the District Attorney would know about it.

Mr. Ziegler: We never knew that such evidence was going to be introduced, your Honor.

The Court: Well, that is a commonplace occur-

rence in every trial, that one party introduces evidence that the other never dreamed of its existence.

Mr. Ziegler: This is the first experience to my knowledge in the courts of Alaska where testimony of this nature has been introduced on a trial of this kind.

The Court: Well, after all it is testimony of the kind that would be admissible in any event so long as it is offered for the purpose of sustaining or corroborating a witness who has been impeached. The only difference is that the testimony here offered for the purpose of sustaining this witness was obtained in a different method, by a different method; that is all.

Mr. Ziegler: That is correct, your Honor. But it has created a situation in our opinion which is more or less damaging because of the surprise in the offering of the testimony. If counsel had even indicated at the outset of this trial that such testimony was going to be made, and the Court will recall that in an opening statement counsel is bound to relate to the jury—— [462]

The Court: Counsel is not bound. The law is that he must make a statement and he may outline the evidence in support of it, but it is always improper for counsel to state any more than what he expects to present in his case in chief. He cannot anticipate the rebuttal, and it is improper for him to state the rebuttal because then he would be anticipating what the defense was going to bring out.

Mr. Ziegler: I merely mention that, your Honor. There was no indication at the outset of this trial

that there was going to be testimony of this nature.

The Court: Well, now, all this discussion is fruitless for this reason, that the rule that permits the receipt of evidence of this kind is operative only when the person has been impeached, and that certainly takes the defendant out of the rule.

Mr. Ziegler: Now, if the Court will permit me, I would like to make a motion for the record, and it is to this effect, that the testimony just received over the objection of the defendant was presented by use of a tape recording machine and that the defendant and his attorneys had no knowledge of the intention to offer testimony of that kind. That is the same as a surprise, and the defendant moves for a continuance of the case until Friday morning in order to enable the defendant to inquire into and, if possible, have expert testimony on the same point, and at the same time the defendant [463] offers to submit himself——

The Court: I have already held that he is not in the class to which any rule of that kind could apply because he has not been impeached. There is no use going over a thing more than once. The rule applies only to somebody who has been impeached and not to anybody else.

Mr. Ziegler: I understand that, if the Court please, but I am entitled to make the motion for the purpose of the record.

The Court: Well, if you are going to make a motion of that kind, you better put it in writing, because I am not going to have it made here before the jury.

Mr. Ziegler: Well, if the Court will allow us time to——

The Court: Well, you can submit it at the next recess, at that time.

Mr. Ziegler: As I understand it, the Court is going to take a recess for one hour?

The Court: A recess for one hour.

Mr. Ziegler: The doctors are busy, and the Court appreciates, I think, appreciates the difficulty of contacting them and going into a matter of this seeming importance in that time, your Honor, and I don't want to be unreasonable, but I do think that the situation in this case, the importance of it, warrants a continuance of the case until Friday morning [464] for the reasons stated.

The Court: I——

Mr. Ziegler: In connection with that, if the Court please, I would state this. This is Thanksgiving Eve. This case under the present condition can't possibly go to the jury until late today or this evening, and we know often times juries remain out longer than a few hours.

The Court: I am aware of all those matters. I have been aware of them from the beginning of the trial, but nobody else seems to have been aware of them. I will take a one-hour recess to enable you to consult with anybody else who may be able to give expert testimony on this subject.

Mr. Ziegler: The doctors are busy, and we will do our best, your Honor, to try to get in touch with them.

The Court: Recess for one hour.

Whereupon Court recessed for one hour, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows:

Mr. Gilmore: May it please the Court, we have had some difficulty because the doctors were busy. I was able to contact two local physicians and surgeons about this matter and, while they are generally familiar with it and they administer the drug of sodium pentothal, they would like the opportunity before they came into a courtroom to testify concerning [465] its efficacy as a truth serum, or it being administered in that form, an opportunity to consult some recent works on it which they have available and which they will be willing to do. I consulted with Doctor Salazar and Doctor Clarke, and they said virtually the same and both told me that, without saying what they said, that their evidence would be of course of assistance to us, along the lines that Mr. Ziegler made this request for, and that they will both be available to the defense and so testify Friday morning.

The Court: Well, I have got three or four cases set for next week, and that is my last week here, and the grand jury is reporting in Juneau on December 7th. Now, I have got to do something to obviate all these delays.

Mr. Gilmore: Well, I know that we would certainly get through with this matter Friday, your Honor, in two or three hours.

The Court: Well, I doubt whether we will be through with it Friday.

Mr. Gilmore: Well, I have every assurance, or I wouldn't say that. We have the entire day. Of course we wouldn't get through with the arguments today, now, before 5:00 o'clock.

The Court: Well, I realize that, but——

Mr. Gilmore: I know it.

The Court: But I think that without even any [466] further testimony it will take all day Friday.

Mr. Ziegler: I can't imagine it would take very long for any further testimony, your Honor.

Mr. Gilmore: It isn't the test. It is their opinions, your Honor, of the efficacy of the trustworthiness of the tests or of the use of this particular drug to elicit the truth, would be substantively what their testimony would be.

Mr. Munson: Your Honor, could I be heard at this time?

The Court: Yes.

Mr. Munson: I just read this motion of the defendant, and the second part of the motion says that they want to have time to give the defendant an opportunity to have tests made similar to that given to the prosecuting witness. Now, the counsel here just talked as if the only thing that Doctor Anderson based his examination and testimony on was the sodium pentothal test, and I think it was made quite clear that that was only a part of the——

The Court: How does that become relevant here now in this discussion?

Mr. Munson: Well, the Government would insist that the defendant, if he is going to undergo the test——

The Court: I have already held that he is not within the rule. [467]

Mr. Munson: Are we arguing this motion or——

The Court: I don't know what motion you have there.

Mr. Munson: Counsel just handed it to me.

Mr. Ziegler: Well, if the Court please, the Court requested us to file a motion in writing, of which I have served a copy on Mr. Munson.

The Court: A motion as to what?

Mr. Ziegler: A motion for time within which to prepare the testimony that we think is material in this case, your Honor.

The Court: I don't recall that I required any written motion. The rule is that a motion does not have to be in writing if it is made during the course of the trial, so it falls squarely within that rule. There is no written motion required.

Mr. Ziegler: Well, I certainly understood the Court to say, "You have to file your motion in writing".

The Court: If I said anything of that kind, it was a slip of the tongue. The only question now is when we should resume again. I am inclined to think that, because of all these other cases which have already been set for next week and the virtual impossibility of concluding them unless we get started on some case Friday afternoon, I am inclined to continue the case to 7:30 in order to conclude the evidence today so there will be nothing but arguments and the instructions [468] Friday morning.

Mr. Gilmore: Well, your Honor, the testimony, see, is—Mr. Munson just mentioned something about truth serum, which, if I am correct, and counsel, we haven't had any time to consult about this or anything like that, but it is my understanding——

The Court: Consult with whom?

Mr. Gilmore: My co-counsel.

The Court: You have had an hour. What have you done in that hour?

Mr. Gilmore: Running around to the doctors, your Honor. That took an hour.

The Court: All you need to do is to call them on the phone.

Mr. Gilmore: Well, you can't discuss those things; you couldn't get them on the phone and——

The Court: All right. Now, I propose to give you until 7:30. Is there any objection to that?

Mr. Gilmore: Well, your Honor, I would submit this, that, if we started Friday morning, if we stated at 9:30 Friday morning, the testimony will be short.

The Court: I have heard those promises before.

Mr. Gilmore: All it will be will be the doctors testifying as to their opinions of the effectiveness of sodium pentothal as a means of eliciting the truth.

The Court: Then, probably, the District Attorney wants to put Doctor Anderson back on, and the first thing you know we have gone up to noon.

Mr. Gilmore: Well, he could only rebut what the doctors said, but it would necessarily be confined to that, but I submit to your Honor that is

the only question now. Am I right about this now?

Mr. Ziegler: That is right.

Mr. Gilmore: And the testimony, your Honor, shouldn't be, in its entirety, over thirty minutes including the cross examination.

Mr. Ziegler: We will stipulate, your Honor——

Mr. Gilmore: That we won't go over that.

Mr. Ziegler: We will stipulate, your Honor, that the Court can shut it off in thirty minutes time. In other words, we will be bound not to consume more than thirty minutes of the Court's time.

Mr. Gilmore: Arguments then would commence——

The Court: You are not the only party here to be heard, you know. There is such a thing as rejoinder on the part of the District Attorney's office. Now, experience has taught me not to rely on these promises of being able to finish in an half hour or so. I have been disappointed nearly every time. It is common for counsel to underestimate by a considerable margin the time that it is going to take to [470] do anything, and I see no reason why you can't have this testimony by 7:30 tonight.

Mr. Ziegler: If the Court please, the Court realizes that these doctors have their patients in the office right up to——

The Court: They are busy all the time, I know.

Mr. Ziegler: It is hard for us to get to them. It is a hardship on them, and it is a hardship on us, to have to do that. It is a matter certainly important enough that I think no great delay will be done.

The Court: I have already said I have got four cases set next week; one of them is a murder case; I can't possibly get through with them, as I see it; and I have got to——

Mr. Ziegler: If the Court please, in a case of that kind——

The Court: ——try to make use of all available time.

Mr. Ziegler: ——in a case of that kind the Court continues cases over the term sometimes, and that can be done right here.

The Court: Well, I am not going to continue it and loaf in the meantime.

Mr. Ziegler: I don't mean the murder case, but some of the other cases that are set are not a question of a man's liberty. They are not criminal cases, and certainly [471] not as much harm would be done there as it would to a man in a criminal case.

The Court: We will recess to 7:30. Ladies and gentlemen of the jury, please bear in mind the admonition heretofore given you.

Whereupon Court recessed until 7:30 o'clock p.m., November 24, 1954, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows:

Mr. Gilmore: Shall we proceed?

The Court: Yes.

Mr. Gilmore: I would like to announce that in the time allowed by the Court we were able to get one of the two doctors I referred to; one is at the

hospital on an emergency; but Doctor Clarke is here, whom I would like to call now.

Defendant's Rebuttal.

JACK W. CLARKE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gilmore): Will you state your name please? A. Jack W. Clarke.

Q. And what is your business, profession or occupation? A. Medical doctor. [472]

Q. And you are a graduate from a recognized medical school, are you?

A. Indiana University, School of Medicine.

Q. And what is your training following your medical?

A. A year's internship at Sacred Heart Hospital in Spokane, Washington; a year's postgraduate study in radiology at Bellevue Hospital, New York University.

Q. And your practice?

A. In Ketchikan, Alaska.

Q. Now, Doctor, are you familiar with the so-called truth serum? A. Yes.

Q. And is it a drug of some kind?

A. There are several drugs that come under the classification of truth serum—sodium pentothal, sodium amytal, any of the deep narcotic or narcosis-producing drugs.

(Testimony of Jack W. Clarke.)

Q. Are you familiar with the drug of sodium pentothal? A. Yes.

Q. And have you administered it?

A. I have given sodium pentothal for anesthesia.

Q. That is its general use, is it?

A. That is its general use at present.

Q. It is, generally speaking, an anesthetic drug; is that correct? A. Yes. [473]

Q. Now, Doctor Clarke, do you know how the general medical profession views the use of this so-called truth serum?

A. Well, generally speaking, the most accepted form, as we use, with the use of truth serum is in psychiatric cases where they have hidden neuroses and so forth. As far as using it as a matter of the truth, lying or not lying, it is not generally accepted in that category.

Q. Now, do you know, generally speaking, of what the recognized authorities in the medical field say about the use and efficacy of truth serum?

A. Yes. I mean, that is where I base my opinion, is what I read from journals that are approved and by text books written by authorities on the subject.

Q. Are you in a position now, Doctor, to give this jury the benefit of what authorities say in regard to the effectiveness of truth serum?

A. Yes. I have several journals and a text book I brought along with me.

Q. If you would please, would you cite an au-

(Testimony of Jack W. Clarke.)

thority, giving as the authority, concerning the recognition that is given to the value of the use of truth serum, which you have talked about?

A. I have several here.

Q. First identify the authority that you quote from and the page, and then proceed. [474]

A. This is the Journal of the American Medical Association, and this number here is May 29, 1954, and on page——

Q. First of all, Doctor, as preliminary to it, is this about, from which you are going to read there——

The Court: He is not going to be allowed to read. The only time that an expert witness is allowed to read from any book is on cross examination. That is a well-known rule. He can give the authority upon which his testimony is based, but he is not allowed to read from the book.

Mr. Gilmore: Well, he can state in his own words, your Honor, can he not, what the authority on the subject said?

The Court: No.

Mr. Gilmore: Can he not?

Mr. Munson: I would object on the ground of hearsay, your Honor.

The Court: There is no use of having him if you are going to have him read from a book. You might as well have the book.

Mr. Gilmore: Then can we read from the book if he points it out here?

The Court: Beg pardon?

(Testimony of Jack W. Clarke.)

Mr. Gilmore: Can we read then from this?

The Court: I said you might as well offer a book as to have him merely read from a book, but reading from a book is not permitted except in connection with cross examination. [475]

A. I can't quote it exactly but I can go ahead and say, but I can't tell you which page I am quoting from, but I can back it up.

Q. Well, that isn't important, Doctor. Just go ahead then and give us——

The Court: Well, be sure to state whether it is your opinion you are stating or the author's opinion.

Q. (By Mr. Gilmore): Well, can you state that it is your opinion and then what your opinion is based on?

A. I have already stated my opinion, Mr. Gilmore, and my opinion is that it is not reliable as to tell whether a person is telling the truth or lying, and you asked me where I got it. I get it from where I read in my medical journals and text books.

Mr. Munson: Your Honor, I object to this witness stating any more than his opinion as a physician who has practiced in the City of Ketchikan, and I object to his making any reference to hearsay authorities.

The Court: Well, he can cite his authorities but he can't read from them.

Mr. Gilmore: No.

Q. (By Mr. Gilmore): But, now, you base your opinion on your practice and the authorities just

(Testimony of Jack W. Clarke.)

like you do on your training from your medical school, don't you? A. That is right. [476]

Q. It is a combination of things.

Mr. Munson: I object to this leading, your Honor.

The Court: Well, you should object before he answered the question.

Mr. Munson: I don't believe he answered that question.

The Court: Yes, he did.

Q. (By Mr. Gilmore): They don't recognize truth serum; is that what you said, in substance?

Mr. Munson: I object, your Honor.

The Court: Objection sustained as leading.

Mr. Gilmore: Simply a summing up. Take the witness.

Cross Examination

Q. (By Mr. Munson): Doctor Clarke, you just said that you have graduated from a medical school and that you have practiced in Ketchikan. How long have you been practicing?

A. I have practiced in Ketchikan over two years.

Q. Two years. Have you practiced in the field of psychiatry? A. I practice——

Q. Have you practiced in the field of psychiatry?

A. No.

Q. When was the first time you read these authorities that you brought with you, upon which you base your opinion [477] that truth serum is not reliable to show the truth or falsity of a statement?

(Testimony of Jack W. Clarke.)

A. This I cannot answer exactly. I can give you an estimation.

Q. Well, isn't it a fact that you——

Mr. Gilmore: Well, let him answer the question.

Mr. Munson: He said he couldn't answer the question.

Q. (By Mr. Munson): Isn't it a fact that——

A. Well, I can answer it as to one year but not as to the minute or the date or the month.

Q. You mean you have read these authorities within the last year?

A. Some of these I have read—one of them, Lundy's Clinical Anesthesia, I bought that book in 1946.

Q. I didn't ask you when he wrote the book.

A. That is when I read it. That is when I bought it.

Q. Oh, you read it in 1946? A. Yes.

Q. Now, isn't it a fact, Doctor, that you just looked up these authorities within the last couple of hours?

A. For this specific thing I have looked up a couple of the recent journals.

Q. Have you ever used the truth serum?

A. To use it as for the——

Q. For an examination or an interview of a witness? [478]

A. To tell if they are telling the truth; no.

Q. I mean, for any reason, Doctor?

A. Yes.

Q. What for? A. Anesthesia.

(Testimony of Jack W. Clarke.)

Q. I mean, besides anesthesia?

A. As sedation.

Q. Besides sedation?

A. That is the main reasons.

Q. I mean, you have used it as a pure anesthetic?

A. And analgesic, or analgesia, narcosis.

Q. Have you used it, for example, have you used truth serum with a patient of yours who has amnesia, can't remember things?

A. Not in that line.

Q. Do you recognize that sodium pentothal is used for that purpose?

A. I can't answer your question yes or no.

Q. As a doctor, do you know that sodium pentothal is used to open up a mind that has become blocked psychologically to elicit something that the patient can't remember while normal?

A. May I answer you in an indirect way? It is used on psychological disorders.

Q. And are you, Doctor, are you familiar with psychological [479] disorders and psychiatry? Do you practice in that field?

Mr. Gilmore: There is two questions, and I object to it as a compound thing. He has asked two questions. Now, he doesn't know which one to answer.

The Court: Well, he is an expert witness. He can answer either one or both of them.

Mr. Gilmore: I have a right to object to the form of the question.

(Testimony of Jack W. Clarke.)

The Court: This is an intelligent witness who is here as an expert. If he doesn't like the form of the question, he can say so.

A. It is hard to answer it yes or not. When you are a doctor and you practice in general practice, you practice all fields of medicine. I am not a——

Q. Even psychiatry, Doctor?

A. Goodness, yes; psychosomatic medicine, which is considered——

Q. I am not talking about psychosomatic medicine.

A. That is a field of psychiatry.

Q. I am talking about mental psychiatry.

A. Yes. You get a certain element of all branches of medicine in general practice, but I am not a psychiatrist or specialize in the field.

Q. And your whole experience with sodium pentothal has been merely as a physician rather than as a psychiatrist? [480]

A. Certainly.

Q. Well, then, Doctor, how do you know, how can you say that a patient who is under the influence of sodium pentothal would or would not be so relaxed mentally that he would not tell the truth? Have you had any experience with a patient like that?

A. Yes and no. I have had patients come, and that was before today in this particular case, and ask about it.

Q. Well, I am not asking you that.

A. And ask if I would use it, and I have then looked up in medical books, not only in that but in

(Testimony of Jack W. Clarke.)

anything. I mean, I try to keep up to date, and that is where I get my opinion. I don't think it is reliable.

Q. In other words, it isn't your opinion based on experience; it is just your opinion from reading these journals; is that right?

A. Those and other medical books.

Q. In other words, you yourself have had no personal experience with the use of sodium pentothal or sodium amytal or any of the other truth serums to show the ability of these drugs to open up the human mind?

A. Yes, I have.

Q. Now, would you tell me what those experiences are?

A. Yes. In medical school——

Q. Not in medical school. In practice. [481]

A. All right. O.K. Internship at psychiatric, as part of your psychiatric training you are given, or you are—I don't know just how to say it, but it is part of your training in your observing psychiatrists, and it has been used, and I have been in the room and part of the team, as you want to call it, using it.

Q. You mean you base your opinion now on what you have observed other psychiatrists doing while you were an interne?

A. No, I don't base my opinion on that.

Q. Well, isn't that what you just said?

A. You asked if I had ever used it or been in to see it.

Q. I asked you if you had ever used it for that purpose.

(Testimony of Jack W. Clarke.)

A. I have told you I have been in on the use of it, but I did not——

Q. You didn't say that you used it. You just said that you were there watching other psychiatrists.

A. That is right.

Q. Have you ever used it yourself?

Mr. Gilmore: The question has been asked and answered, if the Court please, and I object on the ground that it is repetitious, and he is kind of badgering the witness. The same question has been asked three times and answered.

The Court: Well, on the other hand, the witness doesn't exactly answer the question asked. As I understand, the question is not whether he has used it under supervision [482] or merely observed its use but whether he has used it himself in the course of practice. Is that it?

A. As a psychiatrist? Is that what you asked me?

Q. Well, you just said you were not a psychiatrist. I couldn't ask that question.

A. Well, in psychiatric disorders.

Q. Have you ever conducted a sodium pentothal interview with a patient?

A. Yes.

Q. When?

Mr. Gilmore: What is the materiality of the time, if the Court please—that is what I would like to know—as long as he did it?

The Court: Because he doesn't believe him, apparently, and so it is proper cross examination. He is not bound by the answers of a witness.

(Testimony of Jack W. Clarke.)

Mr. Gilmore: But, the time, couldn't he say any time?

The Court: He is asking him to state the time.

Mr. Ziegler: If the Court please, I would like to just interpose here—who said—or what basis is there for saying the District Attorney don't believe the witness?

Mr. Gilmore: Yes; that is right.

The Court: I say that is evidently the reason that he is asking him "When". It is proper cross examination. [483]

Q. (By Mr. Munson): When did you conduct this interview, this sodium pentothal interview?

A. I did not give it for the sole purpose of a sodium pentothal interview, but I——

Q. Then you haven't given a sodium pentothal interview, have you?

A. I have given a sodium pentothal interview, but it is for other reasons other than just to interview them. They are excitable. You are trying to sedate them, quiet them down, and then, when you get them down, then go ahead and try to ask them a few questions, but I did not say, "I am going to give you this with the idea that you will tell me what is bothering you; you will tell me the truth." That I cannot——

Q. I didn't ask you that, Doctor.

A. Then I would—what did you ask me?

Q. I asked if you ever conducted a sodium pentothal interview.

A. To answer that, I would say no then.

(Testimony of Jack W. Clarke.)

Q. Well, you just said, Doctor, that you gave this, you gave sodium pentothal, in order to quiet the patient down? A. Yes.

Q. In other words, you gave it to him to lower his stress? A. Excitement.

Q. His excitement? [484]

A. Yes.

Q. And then you asked him questions?

A. That is right.

Q. Now, isn't it a fact, Doctor, that it is recognized in the profession that sodium pentothal does relieve inhibitions on the mind?

A. Certain inhibitions; yes.

Q. How about the inhibition to fabricate?

A. The profession does not—there is no agreement in the medical profession that it will relieve—how did you state it—the tendency to lie or to tell the truth.

Q. Well, how do you know that? From these journals?

A. Journals; talking with other doctors.

Q. But what has your experience been, Doctor? You are up here as an expert.

A. I am not an expert. I am a general practitioner in the field of medicine and people—

Q. In other words, you are not an expert on the use of sodium—

A. Of course not. I am not an expert in anything.

Q. Are you an expert in the use of sodium pentothal interviews?

(Testimony of Jack W. Clarke.)

A. I am not an expert in anything in the line of medicine.

Q. Then how can you say that a sodium pentothal interview is not reliable? [485]

A. Because I keep up in all fields of medicine to be a general practitioner. I am not a brain surgeon, but I can tell you about brain tumors. I can advise you where to go.

Q. In other words, your opinion is based on what you have read?

A. From other experts; that is what my entire, the whole practice of medicine is.

Q. But your personal opinion is not based on personal experience; is that correct?

A. That is right; absolutely.

Q. In other words, as far as your personal experience is concerned, you don't know whether it is reliable or not?

A. From my personal experience I do not know.

Mr. Munson: No further cross examination.

Redirect Examination

Q. (By Mr. Gilmore): But the knowledge that you have acquired you have made your own, have you not, Doctor?

Mr. Munson: I object to that as leading.

The Court: Objection sustained. You have got to remember, when it is your witness, you can't ask him leading questions.

Mr. Gilmore: I beg the Court's pardon. I will [486] change the form of the question.

(Testimony of Jack W. Clarke.)

Q. (By Mr. Gilmore): Doctor Clarke, you have given your opinion now. Now, what have you—what do you base that opinion on, and, if you have acquired knowledge on this subject that you have testified about and if you have acquired it from various methods and means, such as your medical training, your internship, your practice, your reading and your studying, have you—do you now consider that knowledge of your own?

Mr. Munson: I object, your Honor. This is not proper——

Mr. Gilmore: It calls for an answer.

Mr. Munson: It does not call for a proper——

Mr. Gilmore: I don't know how I could make the question any plainer.

Mr. Munson: His answer would not be proper expert testimony, your Honor. It would merely be gathering from hearsay authorities.

The Court: Will you repeat that last question?

Court Reporter: Q. "Doctor Clarke, you have given your opinion now. Now, what have you—what do you base that opinion on, and, if you have acquired knowledge on this subject that you have testified about and if you have acquired it from various methods and means, such as your medical training, your internship, your practice, your reading and your [487] studying, have you—do you now consider that knowledge of your own?"

The Court: I consider the question unintelligible.

Q. (By Mr. Gilmore): Well, do you have a

(Testimony of Jack W. Clarke.)

formed opinion and do you have knowledge of your own now on the subject matter?

A. I have my own opinion, and my own opinion of pentothal or amytal, the truth serums, is that it is not reliable. I base that opinion on training and reading medical journals and experts in the field.

Mr. Gilmore: Thank you very much.

Mr. Munson: I move to strike that as being improper expert testimony, your Honor. It is not based on the experience of this witness.

Mr. Gilmore: It certainly is most proper, if the Court please. We resist the motion.

A. I am not an expert, Judge Folta.

The Court: Well, I think the fact that it is not based on his experience goes to the weight of his testimony.

Mr. Gilmore: That is right, and not admissibility.

Mr. Munson: Are you through, counsel?

Mr. Gilmore: Yes.

Recross Examination

Q. (By Mr. Munson): Doctor Clarke, do you know from your own knowledge as a [488] medical doctor the training that a psychiatrist goes through?

Mr. Gilmore: I object, if the Court please, as wholly immaterial and irrelevant.

The Court: Well, he already has answered that he is not a psychiatrist and he doesn't pretend to any knowledge of that type, so that it seems to me useless to ask questions of this kind.

Q. (By Mr. Munson): Well, let me clarify it this way, Doctor. The opinion that you just ex-

(Testimony of Jack W. Clarke.)

pressed is not an opinion based on any experience that you have had in the field of——

A. Personal experience.

Q. ——of forensic medicine; is that correct?

A. That is correct; personal experience.

Mr. Munson: That is all.

Redirect Examination

Q. (By Mr. Gilmore): You have never had a baby either, have you, Doctor?

Mr. Munson: I object, your Honor.

The Court: That is just frivolous. You shouldn't ask any such questions.

Mr. Gilmore: Well, if the Court please, he has got lots of other ways than personal experience to——

The Court: Obstetrics is not a part of the examination of this witness under any conceivable theory, so counsel should refrain from being facetious or frivolous.

Mr. Gilmore: It wasn't meant to be. There are no further questions. Thank you very much, and you may come down from the witness stand.

(Witness excused.)

Mr. Gilmore: As I previously announced, your Honor, the other medical authority that we expected to have here is on an emergency at the hospital and I don't think will be available.

The Court: Do you rest now?

Mr. Gilmore: Yes; and we have a motion to make if the Government rests also.

The Court: Has the Government any rejoinder?

Mr. Munson: Your Honor, during the course of this trial the defense has flashed several pieces of paper around which they have sought to introduce into evidence and which have not been introduced for one reason or another, and we feel that the Government has been prejudiced by the exclusion of these pieces of paper because the jury might get the impression that they are damaging to the Government's case.

The Court: Well, but it is not enough merely that some document were flashed. Was there any description of them given? Were they characterized in any way? [490]

Mr. Munson: Well, there was one characterization this afternoon that I would like to call your Honor's attention to. Mr. Ziegler in the examination of Doctor Anderson asked him a question based on a letter which was produced for the first time, purportedly written by the complaining witness, in which he asked, "Supposing you had known about some unnatural act by this witness, would you change your opinion?"

The Court: Well, did he indicate that the letter he had set forth something of that kind?

Mr. Munson: Yes, your Honor, he did.

The Court: Well, you may demand its production.

Mr. Ziegler: We offered it in evidence.

Mr. Munson: I would like not only the letter to be introduced into evidence but I would also like him to put the question——

The Court: Well, I thought you merely wanted

to see it. I don't see any purpose of putting in something that is irrelevant into evidence, but, if you want to see it so that you can make a further motion, why, you may do so, but I am not going to receive anything into evidence that doesn't have some probative value.

Mr. Munson: Your Honor, on reading this letter I don't see where it has any probative value and I request that counsel's remark concerning this letter be stricken as prejudicial. [491]

The Court: Let's see it.

Mr. Ziegler: The Court ruled on the objection.

The Court: I said he could examine it for the purpose of making a further motion.

(The document was handed to the Court.)

The Court: Well, as I understand it, you take the position that the statement made by counsel to which you referred a few minutes ago is the kind that is so prejudicial in character that the Court should order it stricken from the consideration of the jury?

Mr. Munson: Yes, your Honor; I do.

The Court: The motion is granted. The jury will disregard any reference made to this particular letter. Has the prosecution any rejoinder to offer here?

Mr. Munson: No, your Honor; none.

The Court: I assume that counsel understand that by Rule of Court argument is limited to an hour to a side unless the Court for cause enlarges the time. Is that sufficient for counsel in this case?

Mr. Ziegler: If the Court please, if possible, I

don't think in a case of this importance that there should be a limit.

The Court: There is a limit by rule.

Mr. Ziegler: Yes; by rule. I don't think the rule should be applied in this case. I think both sides, including [492] the Government and ourselves, should have a little more time, if it is needed, if we feel that it is needed.

The Court: Well, I realize that it is very disconcerting to have time limited. On the other hand, the reason that this rule was adopted by the Judges in Alaska is that there was a disposition, at least at times, to filibuster rather than argue, and so for self-protection the Courts have adopted that rule, and about the most I can promise counsel is that, if they do not abuse the privilege of argument, or the right of argument, that the Court will not limit them strictly to an hour but that the rule will be invoked if there is an abuse of the right. When I refer to abuse of the right, I refer particularly to repetition of immaterial things. The repetition of something that is vital or important or crucial is of course perfectly proper, not only repetition but emphasis, but that doesn't apply to a lot of these immaterial things that are sometimes argued at great length, so the Court will not limit counsel or invoke the rule unless there is an abuse of it. I rely on counsel not to abuse the right.

Mr. Ziegler: It certainly won't be intentional on our part, I can assure the Court.

The Court: Ladies and gentlemen of the jury, we are about to adjourn to Friday morning. Now,

I assume that it will be impossible to get this case to the jury before 12:00 o'clock noon. Isn't that the opinion of counsel? [493]

Mr. Munson: I believe so, your Honor.

The Court: Well, in order to select a jury for the next case, for the Madsen case, I think I will have to try to conclude this case by noon Friday. Please bear in mind at all times the admonition heretofore given you and be back in the jury box at 9:30 a.m., Friday. You may adjourn court to 9:30 a.m., Friday.

Mr. Ziegler: If the Court please, pardon me just a minute. After the jury goes Mr. Gilmore wants to make a motion.

The Court: The jury may retire now.

(The jury retired from the courtroom.)

Mr. Gilmore: May it please the Court, under the appropriate rule we of the defense now make a motion that Count VII of the Indictment be dismissed for the reason that the evidence adduced at the trial is insufficient to sustain the allegations in the Indictment, as your Honor well knows, which charges that the defendant Rolland Lindsey corruptly endeavored to influence the witness Loretta Lindsey. We feel that the evidence is all in now, and, without reviewing any of it, is is clear in your Honor's mind, and I feel that this defendant is entitled to have this Indictment stricken, I mean, this Count of the Indictment stricken.

Your Honor remembers that they walked down from the house. Even the witness that is supposed to have been [494] corruptly influenced testified she

wasn't influenced, nor she wasn't coerced on the way down, and the defendant himself described the circumstances of their walking from the house down, and the mother while they were there at the Lindsey home, and then the transactions that took place after they were there with Mr. Ziegler then, and we have them leaving the law office at 11:00 or 11:30 in the morning, going their separate ways; that is the undisputed testimony; and then coming back and then signing the statement. Not only is there not any evidence of corruptly endeavoring to influence the witness but there hardly existed the occasion, your Honor, with the possible exception of the times that were spent walking from the Lindsey home down to the law offices of Ziegler, Ziegler & Cloudy, so I think that in all fairness and justice this seventh count of the Indictment, because of insufficiency of the evidence in support of it, should now be dismissed and not presented to the jury.

The Court: I don't know whether the prosecuting witness testified that she was not influenced or not, but the crime is completed when there is an endeavor made, not when anybody is influenced, and the testimony stands as to what she said the defendant told her to say in accounting for the condition of her privates as disclosed by the medical examination. That alone would be sufficient. There is some more evidence from which it could be inferred, or it may be even stronger [495] than that, because my recollection is that she testified that the defendant suggested some of the answers

to her in the interview at the office, and that in my opinion is sufficient to go to the jury on the question whether the defendant endeavored to influence the prosecuting witness, so the motion is denied.

Mr. Gilmore: We don't have to take an exception?

The Court: No.

Whereupon Court adjourned until 9:30 o'clock a.m., November 26, 1954, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon the following proceedings occurred:

The Court: As I understand it, have counsel for the defense agreed on how they were going to split their arguments?

Mr. Ziegler: As the best we can, your Honor. We certainly won't try to be too repetitious.

The Court: I just don't want to hear two duplicating arguments, that is all, and I don't think that that should be done. I realize that some duplication will perhaps be unavoidable, but counsel can see that it is just an imposition to have one counsel make substantially the same argument as the other. With that understanding the United States Attorney may make his opening argument.

Whereupon Mr. Munson made the opening argument to [496] the jury on behalf of the Government; Mr. Gilmore made the opening argument to the jury on behalf of the defendant, and Mr. Ziegler made the closing argument to the jury on behalf of the defendant; and thereupon Court recessed until 1:30 o'clock p.m., November 26, 1954, recon-

vening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon Mr. Munson made the closing argument to the jury on behalf of the Government; and thereafter respective counsel were furnished copies of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury; and the following proceedings occurred:

The Court: Now, when I mention court hours being between 9:00 a.m. and 5:00 p.m., I perhaps should add that the Court will receive your verdict up to 5:00 p.m. tomorrow, if you should be out that late, although it is a half-holiday, but, as I say, the Court will receive your verdict, as though it was a regular working day, before 5:00 p.m., otherwise it will be a sealed verdict. Are there any exceptions?

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred:

Mr. Ziegler: For clarification, Instruction No. 12----

Mr. Gilmore: Page 12, your Honor.

Mr. Ziegler: In this paragraph, the defendant requests the Court, where the word "his" is used, to say "his [497] or her".

The Court: I have instructed the jury repeatedly that the masculine includes the feminine. I will do so again.

Mr. Gilmore: We would appreciate it, so we are sure they know what it means. We know.

Mr. Ziegler: Instruction 8-A on Page 13-A, de-

fendant objects to the instruction for the reason that it is based on introduction into evidence of the actual statements made while the prosecuting witness was under the alleged influence of the truth-serum drug. Is there anything else?

Mr. Gilmore: No; I have nothing else.

Mr. Ziegler: And that the evidence upon which the instruction is based was erroneously admitted by the Court.

The Court: I think you already have that in.

Mr. Ziegler: Yes. While we are here, if the Court please, with respect to this tape recording, I didn't understand the Court's ruling.

The Court: It doesn't go into the jury room.

Mr. Ziegler: Just so that is understood.

Whereupon respective counsel and the court reporter withdrew from the bench and were again within the hearing of the jury, and the following occurred:

The Court: Ladies and gentlemen of the jury, as you have previously been instructed, don't forget that the use of the masculine gender includes the feminine. Whenever you run across [498] the pronoun "he" in the instruction, that includes the feminine and vice versa, so don't be misled by the fact that the masculine gender is used in a way that might seem to be inappropriate in that particular case, because one includes the other, and that is as a result of the law of Alaska as well as most jurisdictions. The singular includes the plural and vice versa, and the masculine includes the feminine and vice versa.

Whereupon the bailiffs were duly sworn to take charge of the jury, and the jury retired to the jury room at 2:30 o'clock p.m. in charge of the bailiffs to deliberate upon a verdict.

(End of record.)

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

Be It Remembered, that on the 26th day of November, 1954, court having reconvened at 1:30 o'clock p.m., at Ketchikan, Alaska, the above-entitled cause on trial before a jury; the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Theodore E. Munson, United States Attorney, and C. Donald O'Connor, Assistant United States Attorney; the defendant appearing in person and by A. H. Ziegler and Patrick J. Gilmore, Jr., his attorneys; the jury all present in the box; respective counsel having presented their arguments to the jury; thereafter respective counsel were furnished copies of the Court's Instructions to the Jury, and the Court read his Instructions as follows:

No. 1

The Court: Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court

to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

You were accepted as jurors in reliance upon your answers to the questions asked you concerning your qualifications. You are just as much bound by those answers now and until you are finally discharged from further consideration of this case as you were then. The oath taken by you obligates you to well and truly try this case and a true verdict render according to the law and the evidence, without allowing yourselves to be swayed by passion, sympathy, prejudice or like emotion.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts. [1*]

No. 2

Count I of the indictment charges that on or about October 22, 1951 at Ketchikan, the defendant had sexual intercourse with Loretta Lindsey, then

* Page numbering appearing at foot of page of original Court's Instructions to the Jury.

and there under the age of 16 years. The crime charged is known in law as rape.

Count II is identical except that the time of the commission of the alleged crime is stated to be on or about October 23, 1952.

Count III is also identical, except that the crime is alleged to have been committed on or about February 27, 1954.

Count IV charges that on or about October 22, 1951, at Ketchikan, the defendant had unnatural carnal copulation by means of the mouth with the said Loretta Lindsey. This charges the crime of sodomy.

Count V is identical except that the crime of sodomy is alleged to have been committed on or about October 23, 1952.

Count VI is identical except that it alleges the commission of the offense of sodomy on or about February 27, 1954

Count VII charges that on or about August 25, 1954, at Ketchikan, the defendant corruptly endeavored to influence a witness of this court, to wit, Loretta Lindsey.

You will note, therefore, that Counts I and IV charge the commission of the crimes of rape and sodomy on October 22, 1951; Counts II and V charge the commission of the crimes of rape and sodomy on or about October 23, 1952; and Counts III and VI likewise charge the commission of the crimes of rape and sodomy on or about February 27, 1954. In other words, it is [2] alleged that both

crimes were committed at the same time and place in each of the three instances referred to. [3]

No. 3

The crime of rape consists of having sexual intercourse with a girl under the age of 16 years with her consent.

In this connection you are instructed that a girl under the age of 16 years can not consent to sexual intercourse because the law makes her incapable of consenting to such an act. In other words, the law resists for her.

The essential guilt of rape consists of the outrage to the person and feelings of the female involved. Therefore, the law does not require proof that the act of intercourse was fully consummated or that there was penetration into the vagina. If the proof shows beyond a reasonable doubt that there was any penetration, however slight, of the female parts, even though there was no emission or discharge, that is sufficient to constitute rape if the other requisite facts are present.

As to each count of the indictment charging rape, you are instructed that the essential elements, each of which must be proved beyond a reasonable doubt before the defendant may be convicted of the crime of rape charged in the particular count under consideration, are (1) that at or about the time and place charged, the defendant had sexual intercourse with Loretta Lindsay; (2) that he was then and there of the age of 16 years or over, and (3) that

she was then and there under the age of 16 years.

The crime of sodomy is defined as follows:

“That if any person shall commit sodomy, or the crime against nature, or shall have unnatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind of either sex, such person, upon conviction thereof, shall be punished.”

Carnal copulation means sexual connection. [4]

The crime charged in Count VII is defined by law as follows:

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in the District Court of the District of Alaska * * * shall, upon conviction, be fined * * * or imprisoned * * *”

“Corruptly” means with improper motive.

This statute is intended to protect witnesses and also the administration of justice.

The essential elements of this offense, each of which must be proved beyond a reasonable doubt before the defendant may be convicted, are (1) that at or about the time and place stated the defendant endeavored to influence a witness in this court, (2) corruptly, and (3) that he then and there knew, or believed, or had reasonable grounds for believing, that she was or would be, a witness.

It is undisputed that the crimes, if committed, were committed at or about the times and place alleged, and as to the crime of rape charged in the first three counts of the indictment it is undisputed that the defendant was then and there over, and

Loretta Lindsey was under, the age of 16 years; and as to the last count of the indictment, charging the defendant with corruptly endeavoring to influence Loretta Lindsey as a witness, it is undisputed that Loretta Lindsey was then and there a witness in this court and that the defendant knew that she was such a witness. Therefore, the only question remaining for your consideration under the rape counts is whether the defendant had intercourse with Loretta Lindsey, and under the sodomy counts, whether the defendant had unnatural carnal copulation with Loretta Lindsey; and under the 7th count, whether he corruptly endeavored to influence her as a witness. [5]

The testimony relied upon by the prosecution in support of Count VII is that given by Loretta Lindsey, that the defendant, on or about the time alleged, suggested that she should say or testify that she had been using a banana for the purpose of masturbation in order to account for the condition of her privates discovered upon a medical examination, and also that the defendant suggested answers to questions asked her in the office of the defendant's attorney. [6]

No. 4

As to any one of the counts charging rape, you are instructed that if you find from the evidence beyond a reasonable doubt that the defendant had sexual intercourse with Loretta Lindsey as charged in any of such counts, you should find him guilty thereof. But if, as to any one count, you do not so

find or have a reasonable doubt thereof, you should acquit him under such count.

As to the crime of sodomy charged in Counts IV, V and VI, you are instructed that if under any of these counts you find from the evidence beyond a reasonable doubt that the defendant had unnatural carnal copulation by means of his mouth with the said Loretta Lindsey, you should find him guilty accordingly. But if, as to any one count, you do not so find or have a reasonable doubt thereof, you should acquit him under such count.

As to the charge in Count VII, if you find from the evidence beyond a reasonable doubt that at or about the time charged, the defendant corruptly endeavored to influence Loretta Lindsey as a witness by suggesting to her what she should testify in court, or what statements she should make concerning any of the charges, you should find him guilty. But if you do not so find, or have a reasonable doubt thereof, you should acquit him under that count. [7]

No. 5

The burden of proving the offenses charged beyond a reasonable doubt is on the prosecution. Whether this burden of proof is sustained is to be determined by you from all the evidence in the case, and not merely from the evidence introduced on behalf of the prosecution. [8]

No. 6

You are also instructed that the opening statements and the arguments of counsel are not evi-

dence, and they are not binding upon you. You may, however, be guided by them if you find that they are based on the admitted evidence and appeal to your reason and judgment, and are not in conflict with the law as set forth in these instructions. [9]

No. 7

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and, therefore, you should not single out one particular instruction and consider it by itself.

Your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses.

No. 8

Subject to the law as contained in these instructions, you are the exclusive judges of the credibility of the witnesses and of the effect and value of the evidence. Evidence includes not only all the facts testified to or established by the exhibits, but also all reasonable inferences which may be deduced therefrom. What facts have been proved and what inferences may be deduced therefrom is for you to determine. The term "witnesses" as used in this instruction includes the defendant.

You are, however, instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on opposing sides, and that the final test is not in the relative number of witnesses, but in the relative convincing force of the [11] evidence. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case.

In determining the credibility of witnesses and the weight to be given their testimony, you should decide what testimony is to be believed in the same

way as you would decide whether to believe something told you out of court. You size up the witness in court in the same way as an informant out of court, observe his appearance and demeanor, note his intelligence, whether he is candid and fair or evasive, whether he has an interest in the outcome of the trial, what motive he may have for testifying as he did, the opportunity he had to observe or learn or remember the facts to which he testified, the probability or improbability of his testimony, his bias or prejudice against or inclination to favor either party, his character as shown by the evidence, the extent to which he is corroborated or contradicted and all the other facts and circumstances which shed light on his credibility and the weight of his testimony.

A witness may be impeached by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to this case; or by proof that he has been convicted of a crime. However, the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you determine. A witness wilfully false in one part of his testimony may be distrusted in other parts. Discrepancies in a witness' testimony or between his testimony and that of other witnesses, if any, [12]

do not necessarily mean that the witness should be discredited. Failure of or a mistaken recollection is a common experience. It is a fact, also that two persons witnessing an incident or a transaction rarely agree on the details especially with regard to time, distance, etc. You should not, therefore, be misled by discrepancies in unimportant matters or in testimony which is immaterial to the issues. But a wilful falsehood always is a matter of importance and should be seriously considered. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should apply the tests stated and give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact merely because a witness has stated it to be a fact, but you are to determine the fact by applying the tests stated in this instruction. And where the testimony on behalf of the prosecution is in direct conflict with that of the defendant or his witnesses, you are not to throw up your hands and conclude that the evidence is evenly balanced or the case not proved, but it is your duty to determine on which side the truth lies, not only by applying the tests given you in these instructions, but particularly by determining what motive the witnesses for the prosecution on the one hand had for testifying as they did, and what motive the defendant or his witnesses had for testifying as they did. **In other words, you should ask yourselves, on the one hand,**

whether the witnesses for the prosecution had any motive to lie and falsely accuse the defendant, and on the other hand, whether the defendant or those testifying to the opposite had any motive to deny the charge or testify falsely, and determine which side is to be believed.

Finally, you may, in determining any question, resort to the sound common sense and experience which you use in the ordinary affairs of life. Also, in addition to drawing inferences and conclusions from the evidence you may consider such matters of common knowledge as are not open to dispute. [13]

No. 8-A

You are instructed that a witness may be impeached by proof that before testifying he made statements inconsistent with, or contradictory of, his testimony. But he may also be sustained or corroborated and the impeachment overcome by evidence that at some time prior to the making of the inconsistent or contradictory statements, he has made statements consistent with his testimony. In this case evidence consisting of four letters and a sworn statement, has been introduced to show that the witness Loretta Lindsey has previously made statements inconsistent with, and contradictory of, her testimony. To rebut or overcome this evidence, and to sustain and corroborate this witness, evidence was introduced to show that the witness, while under the influence of a drug which it is contended rendered her powerless to lie, made statements identical or consistent with her testimony.

As to all this evidence you are instructed that if you find that the four letters and the sworn statements are untrue, or the statements in them were falsely made, you should disregard them. But if you find to the contrary, you will then determine whether she has been impeached, and in this connection you are instructed that you may find that she has or has not been impeached. If you find that she has been impeached, you will then consider whether she has been sustained or corroborated by the statements made by her while under the influence of the drug referred to. Before such statements may be considered by you, however, you must find that they were made while she was under the influence of the drug referred to and that the effect of the drug was such as to make lying impossible or highly improbable. If you so find, you will then determine whether this evidence is sufficient to overcome or rebut the effect of the four [13A] letters and the sworn statement. If you find that it is sufficient, you will disregard the impeaching evidence, and give the remainder of her testimony such weight and value as you think it is entitled to in conjunction with all the other evidence. If, however, you find that the evidence of the statements made by her while under the alleged influence of the drug referred to is insufficient to overcome or rebut the effect of the impeaching evidence or that such statements are false, and further find that she has been impeached, you may disregard her testimony, but you are not required to do so, and you may give her testimony such weight and value as

you think it entitled to, considered in conjunction with all the facts and circumstances in evidence.

In this connection, however, you are cautioned that the evidence of what Loretta Lindsey said while undergoing the truth-serum test is not substantive evidence that the defendant committed any of the crimes charged. It was admitted for the purpose of sustaining or corroborating the witness Loretta Lindsey. In other words, it was introduced to overcome or rebut or neutralize the impeaching effect of the four letters and the sworn statement. If this impeaching evidence had not been introduced into the case, the results of the truth-serum test would not have been admissible. [13B]

No. 8-B

Duly qualified experts may give their opinions on any question in controversy. In this case two witnesses have given opposing opinions as to the efficacy of the drug used in the test made upon Loretta Lindsey to produce such a condition of the mind as to make lying impossible or highly improbable. To assist you in deciding this question you may consider the opinions of the two witnesses referred to, with the reasons stated by each in support of his opinion. You are not bound to accept the opinion of any expert as conclusive, but you may give it such weight as you find it entitled to. You may disregard any such opinion if you find it to be unreasonable. [13C]

No. 9

The law presumes every person charged with crime to be innocent and, hence, the defendant is

entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person who is in fact guilty or to aid the guilty to escape punishment. [14]

No. 10

A reasonable doubt is not just any vague, fanciful or imaginary doubt, but one that arises after a careful consideration of all the evidence or from a lack thereof. It is a doubt based on reason, and not on a bare possibility of innocence, or on sympathy or a desire to escape from an unpleasant duty. Everything relating to human affairs and depending on human testimony is open to some possible doubt, and this is true of guilt.

If after carefully analyzing, comparing and weighing all the evidence, you have a settled conviction or belief of defendant's guilt, amounting to a moral certainty, such as you would be willing to act upon in matters of the highest importance relating to your own affairs, then you have no reasonable doubt. [15]

No. 11

I also instruct you that you should not concern yourselves with the matter of punishment. That is the exclusive concern of the Court. You are not responsible for the consequences of your verdict but only for its truth so far as the truth is determinable by you. [16]

No. 12

Jurors are impaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so, so that there may be an end to litigation. In each case the verdict must be unanimous. But while the verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conferences and discussion in the jury room. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors. The very object of the jury system is to secure unanimity by a comparison of the views of, and by discussion and argument among, the jurors themselves. Hence, while no juror should yield a sincere conviction founded upon the evidence and the law as laid down in these instructions merely to agree with the jury, every juror, in considering the case with fellow jurors, should lay aside all undue pride and vanity of personal opinion and listen, with a disposition to be convinced, to the opinions and arguments of the others and a desire to get at the truth in order that a just verdict, representing the judgment of the entire jury, may be reached.

Accordingly, no juror should hesitate to change the opinion he has entertained or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can

be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty. [17]

No. 13

The law makes the defendant in a criminal action a competent witness. In determining his credibility, you have a right to take into consideration the fact that he is the defendant and is interested in the outcome of this trial. This interest is of a character possessed by no other witness and is therefore a matter which may seriously affect the weight and credit to be given his testimony, and one which should be seriously considered by you in determining what weight you will give his testimony considered in connection with all the other evidence. [18]

No. 14

Upon retiring to your jury room you will select one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with the exhibits except the tape record and one form of verdict. If you find the defendant guilty, you will draw a line through the blank space before the word "guilty," but if you do not so find, you will write the word "not" in such blank space.

If you agree upon a verdict during court hours,

that is between 9 a.m. and 5 p.m., you should have your foreman date and sign it and then return it immediately into open court in the presence of the entire jury, together with the exhibits and these instructions. If, however, you do not agree upon a verdict during court hours, the verdict, after being similarly dated and signed, must be sealed in the envelope accompanying these instructions. The foreman will then keep it in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the Court next convenes at 10 a.m. when the verdict will be received from you in the usual way.

(From this point on the proceedings appear in the Reporter's Transcript of Record" commencing at Line 12 on Page 497, et seq.)

(End of Record.)

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF ARGUMENTS TO THE JURY

Be It Remembered, that on the 26th day of November, 1954, court having convened at 9:30 o'clock a.m., at Ketchikan, Alaska, the above-entitled cause on trial before a jury; the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Theodore E. Munson, United States Attorney, and C. Donald O'Connor, Assistant United States Attorney; the defendant appearing in person and by A. H. Ziegler and Pat-

rick J. Gilmore, Jr., his attorneys; the jury all present in the box; whereupon Mr. Munson made the opening argument to the jury on behalf of the Government as follows:

Mr. Munson: If the Court please, ladies and gentlemen of the jury, you have heard all the evidence in the case. Day before yesterday you heard the last. What you are going to hear now from me and from counsel for the defense is merely argument about the evidence as to what the evidence is and what it proves and what the attorneys themselves think about it. It is up to you to decide what the evidence and what the truth really is.

Now, I would like to begin by refreshing your memory as to the Government witnesses' testimony. You will recall that the first witness for the Government was Loretta Lindsey, a fifteen-year-old child, the complaining witness. She testified substantially that at the age of seven years she was brought into the Lindsey home; she wasn't adopted at that time; she was brought there to live; and that shortly after she came there this defendant began this cold, calculated course of seduction and debauchery. He began by using his fingers on her private parts, and then shortly thereafter, perhaps a year later, he began oral exhortation of this child, and at the age of nine introduced her into the delicate art of sodomy by having her commit sodomous acts upon him.

She testified that when she was nine years old, or approximately nine years old, he called her up one day, or called up his wife, and had Loretta

come down to his boat, which was then tied up at the New England Fish Company, and that Robert was there, and he sent Robert downtown for a pane of glass to be put on the boat; that Robert went downtown, and when he returned the boat was out in the harbor, out in the channel, rather. Where it was in the channel is completely immaterial. Loretta tells us that, while she was aboard the boat, the defendant tried to have intercourse with her and failed, and that from that time until October 22, 1951, he made other attempts at intercourse which failed, but that in lieu of intercourse he continued to have sodomous acts with her, and in which he was the active partner, abusing her, and in which he forced her to take his penis in her mouth, and during that time he was actually going to orgasm with her.

And then on October 22, 1951, she testified, around that date, he was successful. He was finally successful in having intercourse with her. She was twelve years old at that time. And she remembers this day because it was the day on which the first Lindsey child was born. She knows quite a bit about the Lindsey children because she helped raise them, and that day means something to her. And after that she had intercourse with the defendant or the defendant had intercourse with her several times, but she can't remember the dates.

But she does remember again October 23, 1952, when Victoria went to the hospital again. The defendant was home alone with Loretta, and, by his own admission, he says he doesn't remember what

happened that day, but he admits that he had access. On that day he had intercourse with her again, not only intercourse on these two days but this entire pattern of sodomy and intercourse. She testified that he would first attempt to arouse her by putting his mouth and tongue on her private parts, and then after he was finished with that he would have her take his penis in her mouth, and then he would put on a rubber sheath and have intercourse with her. That was the pattern on both those days.

And on February 27, 1954, this year, when the third Lindsey child was born, again a date that she remembers, the same thing occurred, substantially the same pattern; the technique the same.

On New Years Day of this year, which was before the child was born, was another day on which the act of sodomy occurred.

Now, Loretta told this story in great detail. You can't forget it. She not only told the story but she was corroborated by practically every witness in the case.

Robert testified that, as to the Diamond T incident, that I first talked about, he said he remembers that day and remembers being sent for a pane of glass. The defendant, when he was on the stand, remembered sending him for the pane of glass. Incidentally, I would like to point out to you ladies and gentlemen that this Diamond T incident occurred six years ago or approximately six years ago, and the defendant remembers that day and he remembers sending Bob downtown for a pane of glass, but this year on New Years Day and on Feb-

ruary 27th of this year he doesn't remember anything.

On the stand there he told me. "You might as well not ask me anything about those dates. I just can't remember. You are wasting the Court's time." I ask you, ladies and gentlemen, if you were a defendant faced with charges as to particular days, if your minds would be so blank as that. I will tell you why he doesn't remember or why he doesn't want to testify from the stand as to what he remembers, because what he remembers is what he has been accused of, and he knows better than anyone else of his guilt. He would like to erase those days from his mind if he could, now that he has been brought here before you to face his peers in a trial.

Now, there was more corroboration of Loretta's story than I have just indicated. We had Don Riewold come up on the stand and testify that six months ago, seven months ago, she told him about what Mr. Lindsey was doing to her and told him about the sodomy. Florence Dalton testified to the same effect, and so did Doctor Anderson, who examined her shortly after she reported Mr. Lindsey's conduct to the proper authorities.

And then to further corroborate this child we brought Doctor Stagg and put him on the stand. And do you remember Doctor Stagg's testimony? He said that his examination of this child, which was made in early April, around the middle of April this year, showed that she didn't have just a broken hymenal ring—no—far more than that. The perineal muscles were relaxed; the vaginal walls,

relaxed; so that he was able to insert two gloved fingers without any resistance that you would normally expect to feel in a fourteen-year-old child; and that, further, when he made the examination of the vagina and the cervix, he used the largest speculum that he has; and that from the examination of this child he concluded as an expert, a doctor, that her sexual organs were as developed as an adult married woman accustomed to regular sexual intercourse.

Now, the defense put on some witnesses to refute these charges. The first one they put on was the grandmother, Mrs. Pawsey, a good, honest woman. She got on the stand and she testified to nothing that could possibly be construed as helping the defendant. When Loretta told her about these charges, she told her to keep quiet, that it was a dirty case, and that "If you go on the stand, Loretta, you will drink your tears," and she also testified that to her the family name means a great deal and that she feels strongly about her family and doesn't want any shame brought upon them and that to prevent this shame she tried to hush it up and keep Loretta from saying anything about it. And that same day—mark that, ladies and gentlemen—that same day the grandmother took Loretta out of the Lindsey home and brought her to live with her.

I would like to point out at this juncture that, when Mr. Lindsey came back from his logging camp and noticed that Loretta wasn't around the house, his wife told him that she had run away, and on cross examination, when I asked him, "Well, didn't

you know that Mrs. Pawsey, the grandmother, had taken her with her?" and he said, "No," but that that would still constitute running away in his mind. I don't know how the man thinks. Going away with the grandmother to him was running away from home.

The next witness for the defense was Pat Pawsey, another relative of the complaining witness and the son of the first witness for the defense, and he said in effect that on an unspecified date he looked upstairs in the Lindsey home for evidence but he didn't find any. Now, he didn't say what kind of evidence he was looking for, for or against the defendant; he didn't specify; he just said he found nothing; but he did say that he went up there with the grandmother. And the grandmother said she never went upstairs. There is a conflict there. I don't know who is right. I don't see that it makes much difference whose memory is the better on that.

Then another witness for the defense was the defendant's wife, Victoria, and she could contribute virtually nothing to the defense. But she did contribute a few things to the prosecution's case that I would like to point out. In the first place she admitted, reluctantly, but she admitted, that there were times when Loretta and the defendant were upstairs in this big house. That is what she called it. It is a big house. What goes on in one end of the house would not be too likely to be known in the other. She also testified that she rarely went upstairs and that she never went upstairs when Rollie

and Loretta were up there. Now, that is entirely consistent with the Government's case. She also indicated that the distance between Bob's room and Loretta's room was fairly great, which the Government believes is consistent with Bob's testimony that, when he saw Rollie go up to Loretta's room in the early morning hours, even though he was listening he couldn't hear talking. A couple of times he heard Loretta's bed squeaking, but he never heard any actual conversation.

Then Victoria gave some evidence that I think is very important. She told about Loretta's feeling toward the young Lindsey children; that she was fond of the children, and that she is still fond of the children; that she took care of them as much as Victoria did when Loretta wasn't in school, sort of a second mother; and she also said that, when Loretta came back from Wrangell, during that fifteen minutes, while Rollie was getting dressed so he could whisk Loretta down to the lawyer's office, that during that time Loretta asked to see the kids. I submit, ladies and gentlemen, that is what she was there for, to see those kids. She had been gone for several months then, in a strange place, in Wrangell, where she was unknown, and she wanted to get back here mainly to see those children and to see Victoria, her mother, and to see her friends here in Ketchikan. That is one of the crucial things in this case because it explains an awful lot of what was going on in that young girl's mind and why she did a couple of the childish things that she did do. Childish—well, she was fourteen, in the

eighth grade in school. You can't expect her to act like an adult.

And then Rolland Lindsey himself. He doesn't recall much of anything except, strangely enough, an incident that occurred six years ago on his boat. Now, why he should remember that and not remember what happened the day that his first baby was born and his second baby was born and his third baby, and why he can't remember New Years of this year, I don't know but I have a good idea why, because he doesn't want to know; he doesn't want to remember; he is afraid to give any details because he knows that he is guilty. What an uncooperative witness he was. He didn't even make an attempt to remember. He made no attempt to refresh his recollection. He just sat there and said, "There is no use asking me any questions about that day because I just don't remember anything." Well, I think that is patently ridiculous. He had six or seven months to recall those days, and he didn't even try. I submit that there is nothing in his testimony which could possibly be construed to point the way to innocence. Everything he did on the stand showed his guilt.

And then in rebuttal the Government put on the stand a psychiatrist and a medical doctor who was one of the first people to talk to Loretta after she had gotten up the courage to bring these charges. Doctor Anderson examined her on April 28th of this year, and he also examined her on around October 5th and 6th. He spent two days in October with her. And, as part of the examination that he

gave her, he used a sodium pentothal interview, commonly known as a truth serum test, to finally elicit from this child the true facts so that he would be able to get up here on the stand and give his expert opinion as to whether the girl was mentally unbalanced or a psychopathic liar, and he testified on the stand that she was neither a liar nor mentally unsound. She is far from it.

This girl has told an incredible, or, not incredible, but a detailed account of extremely intimate details involving sex, rape and sodomy. On cross examination the defendant asked if she had gotten her ideas out of mystery magazines—mystery magazines. Doctor Anderson testified that in the first place that no one who had not actually undergone these horrible experiences could ever have told a consistent story like that. It couldn't have been made up. It could not have been fabricated even by an adult, certainly not by an immature child, and certainly it could not have been fabricated out of the stuff you find in mystery magazines. You don't find sodomy, in the detail that this girl has told you about, in a mystery magazine. In fact, you don't find it in any magazine.

Now, I think you all know, ladies and gentlemen of the jury, that in cases of this kind, in which a young girl comes before you and tells about the outrages that have been done to her according to her story, that in almost every case the whole trial shifts from a trial of the defendant into a trial of the girl. The defense tries to smear her, blacken her name, and they will go to any lengths to do it.

They will even put three character witnesses up here to testify as to her poor reputation in the community when they don't even know her reputation in the community. They try to show that she made this up because she is hostile to the defendant, and, if the jury panel isn't careful to weigh what is going on, they may be beguiled into trying the girl instead of the defendant.

Now, in this case I would like to point out preliminarily that the defense never did show any hostility on the part of this girl to the defendant. There wasn't any hostility except the perfectly normal hostility of an outraged young child against her dispoiler, and even that hostility she was willing to forget about in order to avoid the shame and the humiliation of coming here before you and to get back into the family graces. There wasn't any hostility shown. She may have tried to run away from home or say she was going to run away from home, but what child hasn't done that? It is a perfectly normal incident of childhood to say something like that.

Oh, of course, the defense is going to try this girl. There is no question about it. They are going to show this statement and going to really count on this. Do you remember what the defendant said, and it was brought out so carefully by his counsel, that within fifteen minutes after Loretta arrived at his house, whisk, off they were down to the lawyer's office, and that, when they got there, both Loretta and Robert Ziegler, and the defendant himself, admitted that he was prompting her on some of these

questions. But he says, "I was just giving her some dates and names and times and places," and I went through this thing and I pointed out every date, every place, every number, and he said, "I don't remember." They were all things that Loretta would have to know, and she knows far better than the defendant knows.

And, if you look this statement over really carefully, you will see that it is really nothing more than a piece of manufactured evidence. The really damaging questions in here, or the really damaging substance in here is not in the answers that Loretta gave—she answers yes and no mostly—but in the questions that are put to her by an experienced attorney, knowing that this case was in being and was going to be presented to the grand jury within a matter of six weeks.

Now, this statement, looked at in that context, when you realize that it was made by a girl who was lonesome, who had just written the day before how lonesome she was, how she wanted to come back and forget all this, this statement begins to make a little more sense, and, when you consider who the defendant is in this case—he is her father—and when you consider also that nobody from my office or no law enforcement officer was there at the time that the defendant and an attorney got this statement from the girl, you can really begin to see what a meaningless thing it is.

You heard the defense counsel reading these letters to you with great dramatic intonation, and I would like to read them to you just exactly the way

they were meant and what the words in them really mean.

"Dear Dad, I hope you forgive me. I know it is a lot to forgive. But, my love for you and Mom and kids is too much to forget too. I have changed a lot in many ways. I will do as I'm told to do, when I come back home to my family. Love, your daughter, Loretta. Over. Oh, yes. I'm dropping the charges that I made against you."

Do you see anything in there that says that these charges weren't true? No. She says—I am dropping the charges; let bygones be bygones; let me back into the family fold. That is a sacrifice. That is not a denial of the truth of these charges.

And here is another one. "Dear Mom and Dad, I beg for forgiveness right now. I have only thought of myself"—that is the sacrifice idea coming out again—"I have only thought of myself in this matter. Dad, I hope you will forgive me. I know I made a mess of things for you and Mom and Randy and Janice and Pat." Notice that—"for you and Mom and Randy and Janice and Pat"—that is the three children. "I'm going to drop the charges that I made against you, Dad. That will mean that will be back at your house." I guess she left a word out. "I guess family love is a thing just one person can't break. I guess Mom was right when she said that I was jumping out of the frying pan into the fire." Think of that. Is that a denial? That is just like the grandmother's statement that "You will drink your tears if you go up on that witness stand. You will drink your tears. It is a dirty case."

Now we have it again, "jumping from the frying pan into the fire." "I hope bygones are bygones." Is that a denial. "I know that you and Mom were doing what you thought was right for me. I hope when I come back home I can make up for what I did. Love, your daughter."

"Dear Mom, I know just how mad you are at me. But I hope you will forgive me. I hope you can do it. I know how hard it will be." This is all childish language, certainly not the type of language you would expect from someone who could make up this sensational, detailed story of rape and sodomy. "When you made me fold clothes I got real mad." I suppose that is hostility. "I right now I would beg to do it. I hope you will forgive me for what I have done. You and Dad got me when I was a little bum." Don't forget that, ladies and gentlemen. Both Robert and Loretta got on the witness stand and told that they were grateful for having been taken in. This was the second time those two children had been adopted. Robert even said that he had no feeling of animosity towards the defendant. Of course he wasn't proud of him for what he had done to his sister, but on the over-all they both feel a certain amount of gratitude for having been taken in by this man. "And gave me a real nice home. So what did I do. Please forgive me. Love, your daughter." In fact, it emphasizes how cowardly this defendant has been, having a little child, a waif, practically, in the house and then seducing her while he has her completely under his domination, completely under his control. What could she do? She

didn't even know at seven or eight or nine that there was anything wrong with it. It wasn't until she got a little older that she realized that this wasn't right.

"Dear Randy, and Janice, and Pat: I know you won't be able to read this. But Mommy will read it to you. I would give my right arm to see you guys." She gave a lot more than her right arm. She practically gave her soul. "I hope you will forgive me for what I have done to you. I will make it up to you guys too. Love, your Sis."

I submit, ladies and gentlemen, that there isn't one iota, much less a word, of denial in those letters. In fact, those letters, I think, show exactly why this child came back from Wrangell, why she came back into the home of this defendant and lecher, why she was willing to forget and forgive. She was doing it for those children and for the family name. That means quite a lot in a small town like this, as you all know better than I. She was willing to forget and let bygones be bygones.

And then what happened? After this defendant whisked her down into the lawyer's office and the statement was extracted from her, and a copy of it quickly brought over to the Marshal's Office by the defendant, who accompanied her, incidentally, to make sure she signed it, then what happened? One afternoon she goes up to see the kids. After she gets there she finds the defendant there. He admits that he was alone with her. He never denied it on any of the dates. He admits he was alone with her. And what does he do? He tells this child, "I don't

think I can control myself." And shortly after that she received another grand jury subpoena; she had already had one before that. And he tells her not to say anything to the D.A. and not to sign anything.

I can't think of one piece of evidence that was brought out in this case, either demonstrative or these letters or testimony on the stand, I can't think of one scrap of evidence which would tend to show, or to disprove the charges that were made here. The Government made every attempt that it could think of to get to the truth of this case. I believe, and I hope that you believe, that the Government's evidence in this case has been convincing. In fact, it has been, as I said on my opening statement, it has been overwhelming. I doubt if there will be another case of this kind, as strong, in this courtroom, and I hope that on your deliberations you will take all these matters, that I have just briefly outlined to you, into account and that you will find this defendant guilty.

Whereupon Court recessed for five minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

The Court: The defense may make its argument.

Mr. Gilmore: May it please the Court, ladies and gentlemen of the jury, it is my intention, because of the nature of the charges in this case, to discuss the evidence in this case from the defendant's viewpoint with you dispassionately and calmly and to the best of my ability.

My special reason for that is that because the sinister thing about a charge of this kind is that simply because one is accused of an offense of this kind it just normally raises great prejudice in the case. Naturally, the charges are in themselves revolting, but you have to be mindful that you must set aside the allegations in the indictment and not necessarily mean that because the charge is there and the recitation is there in the various counts of the indictment that the defendant is thereby automatically guilty of them. It is your duty and your great responsibility to determine whether the evidence is worthy of your belief and convinces you, as the law requires, of the guilt of this man beyond a reasonable doubt of those charges. So, don't associate the heinousness and the repulsive character of the charges themselves with guilt. In other words, don't ever be guilty yourselves of finding the man guilty by associating simply the allegations in the indictment with his guilt without having worthy testimony that convinces you beyond a reasonable doubt that he is guilty of them.

Now, too, Mr. Ziegler, who of course is an illustrious, long-practicing attorney in the Territory of Alaska, and I will both argue and both discuss the defendant's case with you and all the evidence that has been presented here, and we will of course try not to overlap. There might be certain things of course which will be repeated, but not intentionally. I don't intend to discuss at all, he will, the very, very, very important piece of evidence, namely, Loretta's statement, which was made in a cool, calm,

dispassionate manner with every opportunity for reflection and under circumstances which you will well recall.

You know, the fallacious, sometimes, reasoning is that because these charges are made and then a defendant is brought in and associated with them that you necessarily must conclude that he is the guilty man. See, no one else is brought in; so, therefore, you have the charges and you have this man accused. Be mindful of that.

Of course the District Attorney will say, ladies and gentlemen, and I submit to you there was no corroboration of these acts, that acts of this kind are not committed in front of other people. Well, I ask you to think further, ladies and gentlemen. Acts like this of course aren't committed in front of other persons. But don't you think, or do you think that Loretta's word alone, knowing Loretta now as you do, do you think it convinces you sufficiently to find Rollie Lindsey guilty of these acts? Don't you think that, over the entire period of years that they have charged that these acts were going on in that house, that there would be something in corroboration of them if they were true over a long period of time? Well, I do, and I submit that you could reasonably come to the same conclusion.

Now, ladies and gentlemen, as I say, the Government is asking you to convict this man on the testimony, and virtually the sole testimony—there is no other direct testimony in support of Loretta's testimony—on the sole testimony of an admitted liar. She is that by her own admissions. She is that. And

once of course you find a witness who has been admittedly false in one part of her testimony, you are permitted to disregard her testimony in its entirety if you choose.

What is more, ladies and gentlemen, you are being asked to convict on the testimony of a person who has admittedly falsely accused another man of rape on her, and that charge was made following the charge made against her father. I refer of course to Jack Krepps, the Deputy United States Marshal at Wrangell, with whom she had been living for approximately four months during this past summer. Think of the gravity of that. In other words, if she would charge Jack Krepps, and having in mind her motive, why wouldn't she charge her father?

I told you in my opening statement that you would find her cunning and deceitful and worldly-wise. You have had the opportunity to study her demeanor, and you have a right to take that feature into consideration in determining whether or not the witness is telling the truth. You are supposed to reason this thing out and use the same good reasoning as jurors here that you do in the important personal affairs of your life.

Now, let's consider, ladies and gentlemen, Loretta's motive in this case. There is a motive all right, her motive in charging her dad with these offenses. Well, it was, obviously, so that she could get away from home. Oh, not so that she could just run away. She did that, admittedly, several times. But so that she could get away and stay away suc-

cessfully and be free of the parental control, which the law permits the father to exercise over a minor child. Well, there is evidence of that, and I think it is clear, ladies and gentlemen, from her writings, from the testimony of her father's mother and from her very own statements that she wanted to get away. She put it down. Fortunately, we have that in writing, and it is going to be before you, and it is in her statement.

Now, when it comes to something like that, to a motive, you are not to look at the motive, as far as it motivating force goes, in the same manner, in the way that you might look at it, because you have to look at something like that objectively. Sometimes we read of sensational murder cases where the motive was so and so, and you say to yourself, "Well, what in the world would a man commit a murder with that motive for?" That is the way you think. You don't reason that way. You reason objectively. Is it reasonable under all the circumstances for her to have been motivated by that motive? That is the way you think, objectively, as she would think, not as you would think. We read, as I say, sometimes where murders are committed only for the thrill or the theft of five dollars. There have been murders committed for that motive.

Now, the motive in this case is clear. Look at it from her viewpoint. She was unhappy. She said that there was too much discipline, too strict. She was defiant. She was incapable of submission to the authority of her household. She revolted from within. So, that is the way you consider and weigh

and decide upon the motive of Loretta. It is Loretta's motive and Loretta's mind, not yours. You see, you can't supplant your line of thinking for hers. That is the way you come to that conclusion if you are going to come to that conclusion.

Now, of course what weighs heavily and tends to give greater support to the validity of that matter, of the matter that I have just mentioned to you, is that the motive in accusing Jack Krepps of having sexual relations with her was virtually the same. That was a similar motive, to get away from Wrangell. How are you going to get away from that? What does it mean? It means she lied. She told us she lied about her father. She told us she lied about Jack Krepps.

Well, of course there was an attempt to rehabilitate her, of course there was, through the drama of playing back the answers to the questions that were given to her, not by the District Attorney, in the hospital, though he was present. You remember the questions and the answers of course up in the hospital were virtually verbatim of the questions and answers given there. So, what does it amount to? A repetition of what she testified to, putting it there once, putting the same thing there twice. But what do you have? You have the one story to consider.

Now, I want to say, don't think that there is anything magical about, and of course they always say, so-called truth serum. It is an ordinary analgesic or anesthetic which is used every day for anesthesia, to put you to sleep, like the barbiturates or like

other anesthetics. It dulls the mind. It lowers inhibitions. It makes you groggy to the degree that the anesthetic is administered, the proportion, the quantity, the proportion to the amount of drowsiness and the converse. But do you think that there is any drug that can go into the mind and pull out the truth?

Doctor Clark testified it is considered, in his opinion, considered unreliable, and he told us what he based that on, that the medical authorities consider it unreliable. But you can reason that for yourselves. How could a physical situation go into the back of the mind, which of course none of us know anything about—the greatest doctors in the world.

Now, they are trying to have you give some magical importance to that, and, as I say, actually it boils down to having the story told over again, only in a very dramatic way, the drama because of a person being half-groggy and being repeated again and then of course being repeated on a wire recorder. It is the drama that is supposed to affect you—again, influences as distinguished from actual evidence. Is there anything there that wasn't there before? And the questions followed almost verbatim, as did the answers, that the questions of Mr. Munson did. The combination—what does it add up to?

And of course getting back to the motive, as I say, her motive in accusing Jack Krepps—just think of the seriousness and of the consequences. Again, you can't think objectively, but doesn't it

make you shudder to think that the Deputy United States Marshal, who lived there at home with his wife, and Loretta living with them, was accused of that and it was later retracted, and what her motive in doing that was. Of course she went a step further too, and besides the sexual act she said she thought she was pregnant. That was her way of putting it when she told Mrs. Krepps.

On top of that there was testimony testified, her father did, and I believe her mother too, to her defiant, spiteful and revengeful attitude and disposition towards him, and he testified that it was continuous, and he cited innumerable instances in support of that. I submit to you, ladies and gentlemen——

Mr. Munson: Your Honor, I object that counsel is arguing about facts not in evidence. There was no evidence of a continual course of spiteful conduct towards the defendant.

Mr. Gilmore: Oh, I don't agree, your Honor. I asked the question and I think it was the response of the defendant that he did.

The Court: Well, I guess the jury will be the best judge of whether there was any such conduct of that kind.

Mr. Gilmore: I submit to you, ladies and gentlemen, that you have an accuser here, who is Loretta, a young girl. She is not the ordinary young girl, youngster. Again, that is why I admonished you right from the start always to think objectively, think, not how you would act. That is not the situation here, or even how the ordinary young four-

teen-year-old girl would act or respond. You are dealing with Loretta. It is her testimony. Don't you see? And, as I say, I submit to you, she is not only not the ordinary young girl of fourteen. You can see that. But, what is more, she is a maladjusted, a maladjusted and an unstable individual, and, I say, more to be pitied than scorned. That is how I feel. But unworthy of belief; I submit to you that she is.

She wasn't much help to to the District Attorney's Office in supplying dates for these charges that took place over the years. The dates were the dates of the birth dates of the three Lindsey babies. Well, quite a coincidence? I wonder if it is just a coincidence. I wonder about that. If it is, what a coincidence. I don't know whether it is or whether it is a planned coincidence or how it came about, but it is a highly unusual and extraordinary situation, when the events were supposed to have occurred the number of times that they did and they just picked the three times when Mrs. Lindsey was being delivered in the Ketchikan General Hospital. It made it difficult for Mrs. Lindsey to come to the aid of her husband on those specific days because they made sure she wasn't at home. She couldn't be when she was being delivered, and of course the delivery dates, the dates of the birthdays, could be checked with the dates of the charges against him. She came to him in every other way. Every other time, all the years she was home, they lived together continuously and harmoniously over all those years, had babies of their own, I suppose, as soon as na-

ture allowed the same, and yet she testified forthrightly and frankly in behalf of her husband that she never saw any evidence of any immoral acts committed by her father on this accuser. That is what adds special significance to the dates charged in the indictment. Doesn't that make sense to you?

That is all I am trying to do, is talk just a little bit of sense to you, because that is the way you are going to reach your verdict in this case—good common sense. They say about it, you know, that it is the most uncommon thing in the world—common sense. If we could all use common or horse sense more in our important personal affairs, we would get along better. We are prone not to. That is what you are going to do and what you should use, is common sense, meaning good, solid, sound thinking. When the story doesn't ring true, when it doesn't ring the bell, you don't have to believe it. You don't have to swallow things, just because they are told you up here, down your gullet. You don't have to take that.

Now, what corroboration is there for Loretta's testimony, ladies and gentlemen? There was evidence about rubbers being all over the rafters upstairs. Where are any rubbers? What about the cotton balls she testified about? Where are they? The rubbers and the cotton balls would make fine evidence in the case, fine evidence, and you could say, "Well, by golly, there is something to it," because she talked about it. I am not pulling things up out of hot air. Now, where is evidence, for instance, of soiled clothes? You know what I mean

by that. Now, where is there evidence of her ever being caught in an act or in a compromising situation, not necessarily an act of intercourse or sodomy, but a compromising situation? If it was done once, of course it would be plenty, like going to a hotel room or doing it at home once on a certain occasion. It would be planned so they wouldn't get caught. Do you think it is reasonable to do it over seven years, with kids coming and going, and the mother there in her stage of pregnancy over probably the last four years, since the oldest is now about three. An expectant mother is confined, generally speaking, to her home. She testified she was home most of the time.

Now, where is the corroboration for Loretta? Oh, I am not saying it should be manufactured or fabricated; far be it; but I submit to you that it would be reasonable in this particular case to have some or for some to exist. I am not suggesting that the District Attorney bring forth something that he doesn't have. It is simply that it doesn't exist. He is not a magician. He is not supposed to make it up. If it doesn't exist, it doesn't exist.

Now, her brother Bob testified for her. Of course that would be reasonable from the camaraderie there that existed between the two of them from their association. He didn't testify to anything important. I will review that now. He did testify and did what he could to back her up. Of course they ran away, respectively, several times, as he did too. But Bob testified he heard Rollie go into the room early in the morning a couple of times or maybe

several times. That is all. He didn't see anything. He didn't see any act. He didn't see anything compromising. He didn't see them in the light of the circumstances or conditions that would lead you logically to believe that they were committing immoral acts. By that I mean undressed or in any other compromising situation. Just saw him go in the room. Period.

Now, if his little mind was working then, as apparently it was there on the witness stand, and wanting to give you the impression that apparently he did, I would think that it would be reasonable for Bobby to have looked over from here over across there. There is no door here and never has been, and of course it is only the last couple of years when they were upstairs. Do you remember? It was 1950 or '51 when the upstairs was constructed. Prior to that they were all like just in a little huddle down in one room, relatively speaking. Look—from there to there, without any door. He wouldn't have even had to open his door. There is a big crack on each side because the door, the frame around it, is unfinished, leaving an opening on either side of the door of Bob's room. He never did. He never looked over. And that is in the light of what he tries to impress upon you now as "I think my dad is doing something improper to my sister"—all those years. Well, I think, even if it wasn't such a relationship between father and daughter, that a boy, a young fellow, a big fellow like that, would be curious if he thought that that was going on.

Those are the things and I am mentioning them to you because they should appeal to reasonableness, and that is the way this case is going to be decided or should be decided. That is the kind of a verdict we want, based on the truth. That is what verdict means—"veredictum" in the Latin—that—no more, no less. Don't you think that is significant? And, as I say, it was only the last couple of years they were upstairs. Don't you think, if these acts were going on, when they were all downstairs, or even upstairs with the mother downstairs, and of course the ridiculousness of trying to infer and have you believe that he would go upstairs, while she was in the kitchen, is a blast to your intelligence, where at any moment by walking upstairs he could have been exposed either by the kids—there was no doorway; you only have to go up the stairs—by the mother or by anyone else. You have to find him virtually insane to have followed a course of conduct which Loretta has accused him of over this long period of years.

Now, as I say, Bob's testimony in corroboration virtually falls flat. He didn't see anything. He didn't do the things that a normal fellow would do so as to have been able normally to acquire information. See? It is something that he reasonably would be expected to do but didn't do. You have a right to consider that too. And then of course in his bumbling way, when he testified that he came down, and the other witnesses did, that afternoon in the Lindsey's home, when Loretta let loose with this charge, he said, "Yes," and what's more he

went upstairs and came downstairs and said, "Here is the evidence," and threw down an empty can of "Trojan" rubbers. There is absolutely no evidence, not one scintilla of evidence, I submit to you, to connect that empty can of rubbers up with Rollie, and we of course are the ones who are supposed to believe him. He said, "Here is the evidence". And of course half the time he was kind of grinning and smiling on the witness stand as if he didn't know whether the story would stand up or not. You remember his demeanor there. At least he would try it anyway. Now, that is the evidence of this man.

Though, ladies and gentlemen, following the charge and when she was taken up, away from home, away from her grandmother's home, out of the City of Ketchikan, up to Wrangell to live with the Deputy United States Marshal there, Mr. and Mrs. Jack Krepps, and when she had time to reflect and think this thing over and think what she had done without any possible influence, certainly no charge can be made there. It was one hundred miles away. She had time to reflect. She told Mr. and Mrs. Krepps in Wrangell and she admitted she falsely accused her father. She did that. Where in the world can the United States Attorney's Office extract anything or even conjure or even suggest anything, that there would be any influence exerted on Loretta that would come from Rollie or her relations? I submit, not a thing. Everything was actually to the contrary. She was free, uninfluenced, but time to reflect.

See? That is where the old mind that God gave

us, if we do a wrong, will frequently correct itself because we have the conscience. Sometimes it catches up with us. We can lie; we can cheat; and we can steal; and we can slander; and we can commit calumny; and we can falsely accuse our fellow man; and we can be inhuman to humans; but frequently the thing rights itself. Loretta's conscience got the better of her. She told the Krepps that she falsely accused her father and admitted her lying. Every single thing that was done following that first admission to the Krepps is consistent with the fact that it was a voluntary retraction right from the start. She wrote her parents to that effect from Wrangell August 22nd before she came back here. Oh, incidentally, she hadn't seen her parents and hadn't communicated with them from the time she left Ketchikan until she got back on the 25th or 24th.

Then after she wrote her parents she was released by the Krepps. She came home. She begged forgiveness. She went to the Lindsey's home. She went to Mr. Lindsey's lawyers. She made a complete retraction and signed it, took an oath before the notary public, the attorney, before she signed it. She admitted she lied about her father. She was told what lying meant. She returned, I believe, she returned home relieved, spiritually probably better off than she had been in years.

Now, after that of course we don't know what influences were exerted, if any, but after that she changed her story again, back here in Ketchikan. Of course, when he says that she thought that was

the end of it, I don't know what inference can be gathered from that. You can draw your own inferences. See? You are entitled to do that.

Now, it is obvious that this child is disoriented. It is obvious. How would you like to be accused by her, or even you wonderful women who have husbands, how would you like to be the wife of a man who is falsely accused by a girl of rape on her? Why, it makes you shudder. You would say, ordinarily, if you weren't chosen as a juror at this term of court and this thing came up, you would say, probably, "I don't think that such a thing could ever happen." At least you would like to make yourself think that it couldn't and so put yourself at ease because it is so reprehensible. That of course is just as reprehensible as anything can be. It is bad enough that such a thing happens, but how horrible to be falsely accused when you didn't do it, and yet the charge was made. What is worse? What is worse? So I say, I submit to you that she is a disoriented child, a disoriented person.

And I am asking you, ladies and gentlemen, to be mindful of your oaths as jurors that you will return a verdict only on meritorious, only on worthy, convincing, reasonable, truthful evidence. Don't desecrate your oaths and don't sully the halls of this temple of justice. This is a hall of justice. We want it left unsullied, but it won't be if verdicts are to be found on testimony of that kind.

Now, ladies and gentlemen, society will find a mate for this young lady. Society will. They will rehabilitate her. They will help in rehabilitating her

and stabilizing her, if possible, so as to prevent—it is society's duty—so as to prevent, if possible, the occurrence of such false charges against any other man.

Now, of course, the District Attorney will tell you that you are but a link in the chain of law enforcement, and, therefore, law enforcement depends on your verdict. That in itself is a blindfold, ladies and gentlemen, and it can be highly fallacious reasoning. You, ladies and gentlemen, are the bulwark of our whole system of justice. You stand between the accused, who is innocent until proven guilty—see—you are it; you are the whole thing. You are the most important part of our whole system of justice. You, the trial jurors, the sole triers and determiners of the facts in the case, you and you alone, subject to the law which is applicable, which the Court will instruct you on, are the sole judges. Nobody can invade your province. That is why it is one of the highest duties of citizenship, and you are now coming in to about to exercise the responsibilities in connection with it.

Be mindful, be mindful before you find a verdict that it is worthy, that it is based on meritorious and worthy evidence. If it isn't, don't convict. Your conscience should be your guide. It is just as much your duty, don't forget, and you will be instructed so, to free an innocent man or one of whom you are not convinced of his guilt beyond a reasonable doubt, as it is to convict a guilty man.

I think it was pretty significant that after she confessed to Jack Krepps in Wrangell about her

lying about her father that he didn't take much time before he got her under way and notified other law authorities, got her on a plane and got her back here. Of course you can draw your own conclusions as to the circumstances of her providing to come back home after making the statement concerning the charges of her father. You have a right to consider those things that actually happened in the light of the time that the events occurred.

Now, there is nothing in corroboration. I can't help but be impressed by it. No rubbers; although there was testimony about it over the period of years. Is it likely not that something would have been found in that regard, one or some cotton balls, if they were used all the time? No. Just the empty can of condoms that Bob apparently went up to his room and got and brought down and threw down.

Now, ladies and gentlemen, I am going to call your attention before I conclude to something that I think is of tremendous significance in this case, and that is the testimony of Loretta with reference to the successive acts which she said followed a pattern in which there was seldom any variance. You will remember that, and you will remember her testimony in that regard. And you weigh this well. Ladies and gentlemen, Loretta testified on direct examination that the defendant's supposed immoral acts on her followed a consistent pattern in which, as I say, there was very little, if ever, any change.

She testified as follows, substantially, that he,

Rollie, would commit sodomy on her by means of using his mouth on her body, her private parts—(A). (B) Then he would put his privates to her mouth, following which she described carefully and in great detail and exactness how she disposed of the fluid from her mouth—first, by spitting it out in the toilet or in the washbasin downstairs; secondly, by spitting it out into cotton balls. (C) Next she testified and carefully that the defendant would then put on a rubber and have sexual intercourse with her.

Mr. Munson: I object, your Honor, that it is not the evidence.

Mr. Gilmore: That certainly is the evidence.

Mr. Munson: That is not the evidence, your Honor.

Mr. Gilmore: It certainly is.

The Court: No; I don't recall such evidence; but the jury will remember it, I guess.

Mr. Gilmore: Yes. Now, ladies and gentlemen, following that and following the orgasm from the sodomous act, he would put on the rubber and then have sexual intercourse. That was Loretta's testimony.

The Court: The testimony was that all he would do would be to lubricate it in her mouth, but the jury is the ultimate judge of what was said.

Mr. Gilmore: Yes, that is true; but of course, your Honor, I can't help but get around what she spit out from her mouth.

Now, ladies and gentlemen, under the law at this time this defendant stands innocent. He is presumed

to be innocent until he is found guilty beyond a reasonable doubt, and you must find that, as I said before, that evidence convincing and meritorious. If you believe that Loretta lied, falsely accusing her father, falsely accusing Jack Krepps, which she has admitted she has done, you have a right to disbelieve her in all aspects of her testimony. How can you take a chance on being sure of guilty beyond a reasonable doubt of this man's guilt. On the one hand she accused and then said she lied in accusing him, and she accuses another man. She says she lied about that, and she comes up here and wants you to convict a man on that testimony. Ladies and gentlemen, I submit to you the evidence in the case against Rollie Lindsey is not convincing and lacks the merit for which you can base a verdict of guilty against him. I ask you to acquit him and send him home to his family. They love him.

The Court: The argument will be limited to an hour and fifteen minutes to a side. That means that the prosecution has thirty-five more minutes, and the defense has thirty more minutes. You may make the remainder of the argument.

Mr. Ziegler: May it please the Court, and you ladies and gentlemen of the jury, we have been in this case, so far as you are concerned, all week. So far as the defendant's attorneys are concerned, particularly myself, it has not only been all week but it has been every night. I hope and I know that you appreciate the responsibility that rests not only on ourselves but on the District Attorney in a case of

this kind where the effect of your verdict is so much. I think you do.

And now, ladies and gentlemen, I will try not to overlap the argument and repeat the identical things that Mr. Gilmore has said with respect to the testimony of the various witnesses, but I think first you have got to consider the defendant in the case and you have got to look at his record as is before you. The man stands before you with nothing against his record during the time since 1939, which would be fifteen years, that he has lived in this community. If the man was a degenerate such as has been described in this case, don't your common knowledge, your experience in life, indicate that something of that nature would have developed at home?

Now, look back at the very inception of this whole thing. Mr. and Mrs. Lindsey adopted these children. I contend that anyone that goes and takes two orphans and waifs, practically, into their home with the ensuing financial responsibility, and the worry and trouble they had, as the testimony shows, at least the father didn't do that to bring into his home some girl whom he was going to ravish. You know people who have adopted children, and they do it from one of the most noble motives in the world. That is an indication of the kind of person that he is in the first place. So, I am going to talk to you of your own common knowledge, your experiences and the inferences that can be drawn from the testimony in the case.

Now, let us look at the first time this situation

developed. What is the testimony? The testimony is that Loretta made this statement about these misdeeds to the Riewolds and other people. As soon as the grandmother heard about it, what did she do? Now, the grandmother, you can take it into your common knowledge that the grandmother must have known the type of girl that Loretta was. She lived close by and no doubt knew all these things that had happened in that family. What did she say? What would you do if it was your grandchild? Wouldn't you say, as she did, "Let's look into this thing. Let's investigate it. Let's check it and see what there is to it," knowing Loretta's tendency in the past? Wouldn't you do the same thing? It is a perfectly natural thing, and she went on further to say, "If then it becomes necessary, we will take it to court. It can be taken to court." She told you that, and I submit that is the exact reaction that any of you people would have done under the same circumstances.

Now, the next situation developed. Mr. Lindsey heard that she had made this charge. Now, look at that. He heard that he had been accused of one of the most revolting crimes known to nature. If Mr. Lindsey had done these things—now use your reasoning—would he have gone about his business and tending to his log boom? No charge was filed against him. He hadn't been arrested. Wouldn't he have immediately done everything within his power to stop and suppress that girl from ever telling that story? What would you have done? Ask yourselves; I ask you; and answer yourselves, answer the ques-

tion, how you would have reacted under those circumstances.

She could never make me believe and I don't think she can make you believe that Mr. Lindsey at that time even dreamt that such an accusation would be made against him. He apparently passed it off as a foolish, spiteful remark of some kind. He didn't drop everything he had to do and stay right here in town and try to hush that matter up. I know what I would have done had it been me, and I think I know what you would have done. You wouldn't have gone about that business, letting this girl be running around telling everybody what her father had done.

Now, ladies and gentlemen of the jury, it is not a pleasant matter for attorneys to have to get up and attack anybody. God knows I have been practicing law for forty years and I have just about reached the end of my career, and it makes no difference to me about winning or losing a case any more, but it makes a lot of difference to me to see that an innocent man is not convicted. I have seen these cases; I have seen them; I have tried them; and I know what the defendant is up against. I know how easy it is for the jury to say, "Well, if these things are not true, why does the girl make the charge?" That is the natural reaction. The mere fact that I am accused or you are accused of this type of a crime, due to its revolting nature, immediately creates in the mind of the laity, that is, people like yourselves, who have not had too much

experience in these matters, that the defendant is guilty right away.

This isn't the type of case—although that is the law, where the Government has to prove guilt beyond a reasonable doubt—this is a type of a case where a man has to almost to a jury prove his innocence, and it is due to the very thing of prejudice. I want to tell you, as I say, I have seen these cases and I am alarmed and I shudder and I worry about the possibilities of a man being convicted on account of the prejudicial nature.

Experience in the court warns us we must be cautious. As one of the learned justices, Matthew Hale of England, said in these kind of cases—a man who had long experience, and the courts have generally approved his statement—to the effect that it must be remembered it is an accusation easily to be made, hard to be proved, and harder to be defended against by the accused be he ever so innocent. And we must be more cautious in trials of offenses of this nature unless the jury and the judge may be greatly imposed upon, without great care and vigilance the heinousness of the offense charged many times, I say, many times in this world, transporting the jury and the judge with so much prejudice and indignation that they are overly, hastily carried to the conviction of the accused on the confident testimony of false and material witnesses. That is the experience and that is the situation we are in.

Now, ladies and gentlemen of the jury, I am mentioning these things to you to impress upon you the

seriousness of the situation. It is no pleasure and it is distasteful to me to have to say an unkind word about Loretta or her brother. God knows we get no pleasure out of it, but it is our duty as an officer of this court to point out to you things pertaining to their testimony, to their character as you know it, and their demeanor on the stand, in order that you may properly weigh the weight of that evidence.

Now, ladies and gentlemen of the jury, as Isaiah said in The Good Book, let's reason this thing out together—let's approach the problem from reason. That is an admonition from the old days, and it is an admonition as good now as it was then.

Do you think that it is a reasonable story that these acts testified to by Loretta could have occurred in this house in the manner she testified to and Mrs. Lindsey not have suspected something or known something about it? It is an unreasonable story. Is there anything in this case, outside of the testimony of Loretta, perhaps, and her brother, indicating the truth of her story?

Now, you have before you statements by Loretta that these acts occurred while the wife was in the house. Her testimony is on one occasion or more, while Mrs. Lindsey was cooking dinner, Rollie Lindsey went upstairs and committed these acts. If the man, any man, had done these things, he should be on trial for insanity not on this charge. That is not reasonable. It is not a reasonable story at all.

Now, then, as corroboration we come to the testimony of the boy. The Court will instruct you that you can weigh the value and truthfulness of testi-

mony by the demeanor of the witnesses on the stand. What did Bob testify to? I am mentioning things now that Mr. Gilmore did not cover, I think. Bob testified to this incident about the boat. His testimony that he wanted to leave with you is that the boat went out in the channel and drifted from the New England Fish Dock to the end of Pennock Island. And you remember how indignant he got with me when I tried to fix some spot where he claims he had seen the boat. Now, ladies and gentlemen, I don't think that is true and I don't think that you believe that is true whatsoever. In the first place, common knowledge tells us that, if you cast your boat out here in the channel from the New England and permit it to drift, it will ground before it ever gets——

Mr. Munson: Excuse me, counsel. This has all been stricken from the testimony, your Honor, as to the boat's position in the channel.

The Court: I have held that the only thing that is material about that testimony is whether or not the defendant was alone out on the boat with her, not the currents or tides or the precise location or whether the lines were thrown off.

Mr. Ziegler: I understand that is the Court's ruling then.

The Court: Yes.

Mr. Ziegler: Now, we get down to the next part of his testimony. When this thing broke, he shows up with an empty can which at one time had rubbers in it. Where did he get the can? If Mr. Lindsey had used that in perpetrating these alleged

crimes, there would be another case of insanity of leaving that up there were it could be found. Ladies and gentlemen of the jury, I tell you in all sincerity that you are justified in believing that Bob Lindsey deliberately got that can some place or one of his own and brought it down there to help make this charge stick.

Now, there was testimony, as to the use of rubbers, by Loretta. It would do us no good to go to the Lindsey's drugstore and have the proprietor or the clerks come up and say that during that time Mr. Lindsay never bought any. That would not be of any information to you. But on the other hand, had there been rubbers in the house, had Mr. Lindsey during that period purchased it, the United States Attorney unbeknown to him could have found out the drugstore at which he dealt and tried to establish whether he had actually purchased it. I am not accusing them of doing anything they shouldn't do or failing to do something they should have done, but we feel it is a matter to be taken into consideration.

Now, then, Mr. Gilmore covered pretty well and explained to you the incredibility of Bob's story about what happened upstairs. Here is a story of many acts of the most revolting nature having been committed in a room upstairs with the door open, no door to it, and the defendant's wife on the premises, in the house, and the brother right across the room. Does that appeal to your reason or your logic?

Now, then, we come to the question of the corrob-

oration of the condition of Loretta as testified to by Doctor Stagg. You know what the testimony was. Doctor Stagg didn't tell you and he couldn't tell you that it was Rollie Lindsey who was responsible for that condition. Now, here is where you have got to use your common knowledge again, and, if you believe that the condition of her organs was such to indicate that she had sexual intercourse, is it unreasonable to believe that a girl of that age and that development running around this town didn't have intercourse with boys, as some of them do, and we know it? Now, are you going to say, "Because that condition existed it proves to my satisfaction that Rollie Lindsey is responsible for it"?

Now, the next question comes, and it is going to be stressed on again; it has been throughout the trial; and it will be in the closing argument. Well, now, if these things didn't happen, how could the girl tell it in this detail? I submit that girls of this age, not all of them, some of them, know more than their elders about those things. The District Attorney here last week was surprised to find out how much these little girls, some of them eleven or twelve years of age, were drinking and out on parties all night.

My belief is that anything Loretta didn't know about it could be supplied by her brother so far as details go with respect to these things. He is sitting here. You judge his demeanor, and is his testimony the kind that you would act upon in the most important affairs of your life? Would that carry sufficient credence and conviction for you to say, "Well,

I am just as sure of investing this sum of money as I am of the truthfulness of Bob Lindsey's testimony"? If you don't believe him in one thing, you can't believe him in another, and it was explained to you. He testified that he suspected something was going wrong upstairs. He played possum, let on he was asleep, and he never got up, after he claims Mr. Lindsey went into the room, to go over there and protect his sister. It is inconsistent, contrary to all actions of a normal person.

Now, following that, I want to take up with you the question of this so-called truth serum. It is a misnomer. It is a drug that renders a person half-way conscious and halfway unconscious.

Mr. Munson: Your Honor, the counsel here is repeating everything that the other counsel has testified to. It is just double argument.

The Court: That is why I imposed the limit, because I thought that his co-counsel covered practically everything and that there couldn't be another argument of the same length without repetition, so I have limited him to thirty-five minutes, and he still has about twelve minutes left.

Mr. Ziegler: That is just preliminary, your Honor, to a portion of that testimony that I don't think Mr. Gilmore covered. The testimony in that connection was that it has the same effect as morphine or any other drug or sedative; the only thing, it enables a person to remain in that condition longer and is enabled to do it easier.

Now, in that connection you will recall that Mr. Munson indicated that when Loretta gave that state-

ment in our office to my son that they were not there; they were not invited. I want to call your attention to the fact that, when this serum was administered, we were not invited there. Maybe we had no right there. I don't know. But it would seem fair to me, if anything was unfair about the other, that we should be there or notified about it to have a doctor there to protect the interest of our client, but it wasn't done.

Now, in the testimony concerning that very thing you will recall the condition that was shown by the playing of the record and the doctor's testimony, and you will recall that the questions were put to Loretta by the doctor and the manner in which the questions were asked. Naturally, a person in that weakened condition is going to respond the way she thinks the people who brought her there want her to respond. That is a simple, easy way to prey on the mind of this girl.

Now, all that that truth serum test, so-called truth serum test, proves is an opinion by Doctor Anderson. He said his opinion is from that test that she was telling the truth and couldn't tell a lie. I wonder what his answer would be had Mr. Lindsey taken a test and told the same story that he told the Court. Would it still be true that a person under that influence couldn't tell a lie? Think about it. Answer that question.

And before I forget it, ladies and gentlemen of the jury, when you get into the jury room please read the statement signed by Loretta and please read the Court's instructions because you have got

to base your evidence on the evidence and the Court's instructions—I mean, base your verdict—and once you do that no one can question your verdict. You are the supreme power. The President of the United States cannot criticize you or question your verdict.

Now, then, with respect to Doctor Anderson's testimony, I have had experience with psychiatrists giving opinion evidence; the Court has; the District Attorney has; and we know it is an absolute fact that you can get two psychiatrists to come into court on the same set of facts and give you diametrically opposed opinions on those facts to the utter confusion of the court reporter and the bewilderment of the jury, because they are not swearing to a fact; it is only a matter of opinion. Psychiatrists at one time had a little better standing in the medical profession than they do today. It has been said by various people that a psychiatrist is a man who contends he knows everything there is to know about anything until he winds up knowing everything there is to know about nothing. That is the way a lot of people regard the weight and effect of the testimony of a psychiatrist. It is only on an opinion, and it doesn't constitute evidence of fact. Courts accept it. They are permitted to testify under the instructions of the Court that it is purely a matter of opinion.

Now, ladies and gentlemen of the jury, I have tried the best I know to show to you the inferences and the logical deductions and conclusions that you can draw. If I have said anything at all in the argument of this case that doesn't appeal

to your logic, I know you won't pay any attention to it. I know you will disregard it and throw it out the door. I have tried to explain the evidence. I have tried to point out where the evidence in our opinion is unreliable. If you do not agree with me on any particular point, as I say, I don't want you to be influenced by anything I have said, and I know you won't.

Now, ladies and gentlemen of the jury, my time is about used up. The District Attorney will reply to our argument, and remember this, that everything that the last person who addresses the jury says, if we had an opportunity to come back again, we could explain to you some of the points that would be made, and we ask you to take that into consideration and weigh these things, which are said, very carefully. As I have often said in forty years of practice, I would surrender the presumption of innocence that follows every defendant in a case of this kind if the attorneys for the defense could make the closing argument to the jury. The last impression often has a terrific effect because it can't be answered.

Now, ladies and gentlemen, in conclusion I want to ask you in the interest of justice to consider this evidence, the character of the witnesses who furnished any information, and for God's sake don't let your judgment be influenced on account of the prejudice you might feel in connection with the nature of the charge. I explained to you how the courts look upon this type of a case. The utmost caution must be used unless an innocent man is

convicted entirely on account of the prejudicial nature of the case.

I am glad that the ordeal of a trial of this kind is about to be over as far as I am concerned because, as I explained to you, it certainly hasn't been pleasant, but as an officer of the court and as an attorney before this bench and bar, when a man comes to you with his trials and troubles and you believe in his situation, if you are an attorney who has any conscience, any feeling, you are going to devote your time and your energy, no matter what it takes out of you, to do everything humanly possible to bring before you ladies and gentlemen of the jury the facts, the evidence and the logic of it and the inferences to be drawn therefrom.

This I have done, and I hope and trust, and I know you will, you will bring in the verdict based on the evidence and the inferences that you can draw from it and the instructions from the Court, and I feel sure that from this day on, when that verdict is rendered, you will never, if it be guilty, be disturbed the rest of your life when you go to bed, when you go to church, and a doubt rises in your mind—was I right? Did the evidence justify that kind of a verdict? That is something you have to consider, not only that but the welfare of the defendant and his family and his children, and in that connection I think you must be convinced that Mrs. Lindsey never believed this story; you saw her on the stand; that she never had any reason to believe it, because no woman, knowing or believing, having reason to believe her husband was such a

degenerate, would stand by him like Mrs. Lindsey has done. That to my mind is stronger than any evidence that can be produced in this court. That to me is convincing and should be convincing to this jury.

The Court: Ladies and gentlemen of the jury, court is about to recess to 1:30. You should bear in mind at all times the admonition heretofore given you as to talking about the case or permitting anyone to talk to you about it or arriving at an opinion. You may recess court to 1:30.

Whereupon Court recessed until 1:30 o'clock p.m., November 26, 1954, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; and the trial proceeded as follows:

The Court: The prosecution may make its closing argument.

Mr. Munson: May it please the Court, ladies and gentlemen of the jury, I would like to remind you now that what I predicted would take place did take place. The defense counsel put Loretta Lindsey on trial and put Robert Lindsey on trial and made no mention of the defendant's trial, which is what we are here for.

Now, the defense is never satisfied with the Government's evidence in any case. In a case of this kind they always demand more, more corroboration, more proof, even though the very crime itself by its very nature is secret, hidden. From what I gather from the defense's argument, the case isn't proved to them unless there are photographs of a

sodomous act or of a rape. If we had that kind of evidence, ladies and gentlemen, we wouldn't be here on trial—this defendant wouldn't be here on trial.

There was plenty of corroboration in this case. Take Doctor Stagg's testimony; that is pretty good corroboration—a fourteen-year-old girl developed like an adult woman, married woman, used to regular sexual intercourse. That is not easy to explain away, and they couldn't explain it away by saying that she might have been out at night. Why, the defendant himself on the stand said the children were kept under pretty good discipline. If she had been running the streets at night, ladies and gentlemen, there would have been evidence in the case to support that.

The defense made much of this accusation that was elicited, or the accusation against Jack Krepps, which Loretta readily admitted on examination. Now, that accusation was just about what you would expect a kid to make up who is going to make up an accusation out of any sex crime. She just said to Judy, "Someone had intercourse with me that you know real well," no details, just a flat accusation like that. Nobody paid any attention to it. Nothing serious has flown from that accusation. It was pure kid stuff to get away from Wrangell, to get back here amongst her family and friends.

Why did she choose that method? Because she knew that when these charges were filed against the defendant in this case that she was almost immediately sent away from Ketchikan, and in her

childish mind she figured that the reverse would be true—"I want to get back to Ketchikan so I will make an accusation." Well, what I want you to notice is the lack of detail, no detail, just an accusation. If this girl were hostile towards her father, which they never proved and which I don't believe ever existed, would she sit down and manufacture a tale of detailed rape and sodomies over a period of seven years? I submit she would not. She would have said, "My father raped me last week," or some such thing, and there wouldn't be too many corroborating details if it were untrue.

The next thing that the defense relied on was this statement, this statement which was practically the result, the end product, of those letters, those yearning letters to come back to the Lindsey children, to come back to Ketchikan. She no sooner gets back than she is whisked down to the office of a lawyer and words were put in her mouth both by an experienced attorney and by the defendant himself, and that afternoon she comes back to the office, and who is there? The defendant is there, and she no sooner signs a statement and it is in the hands of the Marshal. Why wasn't the Marshal notified before? Why wasn't he there, or somebody from my office? That is my witness; that is the Government's witness. They talk about legal ethics, when they referred to this truth serum test—oh, how unethical it was.

Mr. Ziegler: If the Court please, we made no criticism of counsel at all. We made no reflection upon legal ethics at all. We criticized justly what

we think of an expert witness, but there was no question of ethics.

The Court: I think there was something said about the propriety, however——

Mr. Munson: It was said, your Honor.

The Court: ——of taking the statement of the prosecuting witness under the influence of this drug without calling you.

Mr. Ziegler: That is correct. I did mention that.

Mr. Munson: The propriety was brought out at the trial and it was brought out in the argument of both counsel, and the jury, I am sure, will remember that. Now, propriety, ladies and gentlemen, that is the same thing as legal ethics in my book. Here, I came back to Ketchikan and I was faced with an affidavit or statement that had been wrested from this witness in my absence, and without any representation by my office, by the defendant and by defense counsel. Now, that is unusual. But what I did, I interrogated my own witness and put her under the influence of a drug that would inhibit her ability to fabricate, had her examined by a psychiatrist so that he would be able to detect a fabrication. Why? Why did I do it? Because I wanted to find out what the truth was. There is no duty on my part in interrogating Government witnesses to have the defense counsel there. In fact, it is a patently ridiculous suggestion. It is never done.

Now, the other thing that the defense tried awfully hard to do here in the trial and never succeeded in doing was trying to show that Robert Lindsey was hostile towards the defendant. And

what did he say? He said, "I like him. He has done a lot for me." What did Loretta say? She said she wanted to get back; when she was in Wrangell, she missed them; she missed the kids, and she missed her aunt. Oh, I don't think she missed the defendant. How could she? But she did miss the family influence. That is not hostility, ladies and gentlemen. That is far from it.

The only thing that the defendant could produce in the way of a hostility-provoking situation was one time in the kitchen about two weeks before April 10th or 12th, when these charges were filed, he slapped her, and that is supposed to be the motivating factor to induce this girl to make up a bunch of lies. Why, it is absurd, and it doesn't explain any of the testimony in this case. It doesn't explain why she was going over to Don Riewold's house crying on Saturday, April 10th.

And this business about running away from home, I have already mentioned that once. I don't want to press it because it is just too obviously ridiculous. This girl wanted to get away from home, ladies and gentlemen, just for one reason, and that was to get away from him. They call it a motive, running away from home. They call it a motive. I call it an escape. The entire defense of this case has been that statement. And, yet, the defense counsel dwells on motive, trying to show that she had a reason to make up these charges because she wanted to get away from home.

Now, the truth serum test has been emphasized by defense counsel. I want to call your attention

to the fact that this truth serum test was not taken in a vacuum. It was only a part of a psychiatric examination that lasted for at least two days in October and one day in April, and standing by itself it would not be overwhelmingly significant, but take into account that an expert psychiatrist had given this girl innumerable tests, including this truth serum test, and concluded after knowing all the facts, including this childish accusation against Jack Krepps, he said that this girl is mentally sound, she is not a liar, and she could not have fabricated a story of this kind.

In rebuttal we had Doctor Clark get up there on the stand, obviously having just quickly looked over a couple of medical journals, completely missed the point of the truth serum test as it was used in this case, and said that he didn't think it was very reliable. But he doesn't know because he has never given one.

The defense asked you to think objectively and said this is not the ordinary young girl of fourteen. Well, we agree. How could this girl, after seven years, seven and a half years, of the treatment that she has undergone, be an ordinary young girl of fourteen. I think she is an extraordinary young girl. I think she is amazing. Maybe she is to be pitied, as the defense counsel has said, but she is not unstable, and she is not maladjusted, and she is not unworthy of belief, and we have some pretty good expert testimony plus plenty of corroborating testimony in this case that would indicate that. Think of what Doctor Anderson said about this

girl. He knows her and her mind better than anybody in this case.

Then they point out these dates of the births of the Lindsey children. I told you before in order for us to frame an indictment we have to have dates. We can't just say that for the period of seven years this man has been raping and committing sodomy on his daughter. You have got to give him an opportunity to know when these events occurred, and the indictment is written in the following fashion—that on or about the 22nd day of October, 1951, he committed rape, and in the later count sodomy on that date, or on or about that date; on or about the 23rd day of October, 1952, he committed rape and he committed sodomy on that girl; and on or about the 27th day of February, 1954, he raped her again and committed sodomy on her; and the last count of the indictment says that he tried to influence her to cover up material testimony before the grand jury so as to sabotage this case and obstruct justice. Now, that is in essence what he is charged with.

But think of the testimony. Think of what was brought out in this case. It was brought out that he had attempted rape on the Diamond T when she was nine years old, that he had committed sodomy on her when she was seven and eight, and even this New Years he committed an act upon her, and what is his answer to all that? "I don't remember." He denies—of course he is here because he did deny the charges, but he just doesn't remember what happened. He can't remember any-

thing about those dates except that a baby was born on the dates charged in the indictment. The very fact that he tried to influence this girl, the very fact that he dragged her down to the lawyer's office, is a significant factor to be considered by you in arriving at your verdict.

They say, the defense counsel says, "Don't believe Loretta." I ask you, who are you supposed to believe then? Mr. Gilmore or Mr. Ziegler? Because, certainly, there was nobody else on that stand that gave any evidence tending to disprove any of these charges in this case.

They said, "Where were the rubbers in the rafters? Where were the cotton wads?" I think the answer is simple. Ask the defendant where they are. It was his house. They made the search for the evidence. We didn't.

They said Bob didn't see anything, even went over here and pointed at this sketch. Bob's room is here. Loretta's room is there. This door was shut but there is a crack in it. Is he supposed to see over in here? "He didn't see anything." Well, he testified that he saw Rollie coming out of the room in his bathrobe, and he also testified that he saw Loretta come out a couple of times and she had tears in her eyes, and he also said that he heard him going in in the early hours of the morning, five or six o'clock, he guessed. They want a photograph. That is what they want. Bob can't look around corners.

They kept saying that Rollie Lindsey would have to be insane to have done these things. Well, he is

not on trial for insanity. Maybe he is insane. I don't know. They said not one scintilla of evidence connected Rollie with this "Trojan" can, not one scintilla. Well, who produced the "Trojan" can? It has been in his custody for seven months. That is a little more than a scintilla in my book.

They said Robert didn't know whether his story would stand up or not. Well, did it? Did they break him down on the stand? Did Loretta's story stand up? They had her up there for three hours. Did her story stand up or didn't it?

They talk about her conscience. Sure, she has got a conscience. I wonder if the defendant in this case has a conscience. Well, it wasn't Loretta's conscience that got the better of her in so far as that affidavit is concerned. The thing that got Loretta was her love, her genuine love, for those kids and for her family, of which he isn't really a part. He is just a fringe member. They call her disoriented, but Doctor Anderson said that she was, considering the circumstances of her young life, he considered her pretty well-balanced emotionally. And then the defense said that society would rehabilitate her, as if she were on trial. I say, what is society going to do about him? He is the defendant in this case.

Sure, the verdict of juries is an important part of the law, as the defense counsel said. I think it is the most important part of the law. We can get up here and introduce evidence forever, but the thing that makes the impact on a community is whether or not juries will return a verdict of guilty and especially in these cases where, ladies and gen-

tlement, you have these young girls, where, if they do have the sense and the courage to make a complaint, and so few of them do, they get excoriated up here; they are smeared; they are called sluts.

Mr. Ziegler: Now, if the Court please, I don't think that is a fair statement to the jury. I know that word wasn't used, and I don't think it could be inferred.

Mr. Munson: I think the inference was made, your Honor.

The Court: I don't have a recollection of the evidence sufficient to pass on that. The jury will have to rely on its own recollection.

Mr. Munson: They say, "Consider the defendant." And I say, consider the victim and the potential victims of this type of atrocity when you are arriving at your verdict. This is really a cowardly, a cowardly offense because the chance of detection in the first place is so low, the chance that it would even be brought to light is so slim, and the chance or the opportunity to get someone that would be able to get up there on the stand and tell you what happened to her is so unusual that these cases are rare indeed.

They said you wouldn't have gone about your business, if you had been accused of these crimes, from the beginning. Well, I put it to you this way. If you were guilty, what else could you do? If you had been charged justly of committing a crime like this, what else could you do except go about your business and hope? And that is what he has done—hoped.

He said, "Consider Robert on the stand, and consider Loretta on the stand, how she acted." I say to you, consider how he acted on the stand. Was he convincing and inspiring in his denials, or did he show himself to be what he is, a guilty man, who doesn't want to remember anything that he doesn't have to?

Mr. Ziegler said that he would gladly give up this presumption of innocence for an opportunity to have the last word with you. "These cases," he said, "are hard to prove and hard to defend." Well, I would be glad to let him have the last opportunity to speak, I would welcome it, if he would also take the burden of proof, the burden of proving to you beyond a reasonable doubt that this man is innocent. I would be glad to let him have the last word to do that.

"Let's reason this thing out together," he says. The story to him is unreasonable. Now, what Mr. Ziegler thinks of this story is of no moment. When he said he thought it was unreasonable—why—because he says Victoria would have suspected something over a long period of time like this. Well, I say, I think she did suspect something; she probably did; and she probably knows now, as she sits here in this courtroom, that he is guilty. So what? She is his wife. She has got to stick with him.

Then, they intimated—counsel in spite of their promise did overlap in their arguments, and of course I am repeating myself because I am rebutting what one counsel said. One of them said that Robert deliberately framed him with that

"Trojan" can, and I say again, who introduced the "Trojan" can and who has had it in their custody all these months? Not Robert. The defendant.

This girl has gotten up here and done really a wonderful thing. It has taken courage to do it. I admire her myself. I think Doctor Anderson does too. I think he indicated that on the stand. I don't believe that this girl is fully cognizant yet of just how this man has hurt her, how he has ruined her. In my book this crime is worse than murder, far worse, because this defendant has, he has murdered this girl's soul.

And then, when she gets up here on the stand and tells you about it, he says, "Ah, but her soul is black." Well, what do you expect it to be—saintly—after seven years of debauchery? That is the thing about these cases that is so maddening, is the fact that the more successful the debaucher is, the more completely he ruins his young victim, why, the more they get her up on the stand and characterize her as a liar and a sneak and a thief.

Think of this girl when you are down there, when you are down in the jury room deliberating on a verdict. She has done a really heroic thing. I think that with all the evidence that you have before you, the corroboration, the psychiatric examination of her mind to see how she thinks, the mass of detail that she has told you. I believe that you will find that the Government's case with the help of this young victim has been overwhelming, and that society will take its vengeance in the accepted man-

ner upon this conscienceless man, and bring in a verdict of guilty.

(End of record.)

[Endorsed]: Filed March 31, 1955.

[Endorsed]: No. 14739. United States Court of Appeals for the Ninth Circuit. Rolland Lindsey, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, First Division.

Filed: April 25, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14739

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROLLAND LINDSEY,

Defendant-Appellant.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 17(6) of this court, appellant states that the points on which he intends to rely are:

1. That the trial court committed reversible

error in permitting to be introduced over objection a tape recording of testimony of the prosecuting witness while the latter was under the influence of sodium pentathol. That the admission of this tape recording deprived the defendant of a fair trial and that such admission violated the due process clauses of the Constitution of the United States, Amendment 5 and Amendment 14. That the admission of said testimony was in violation of the hearsay rule.

2. That the trial court erred in entering judgment of sentence and conviction by reason of the fact that there was insufficient evidence to sustain all counts of the indictment on which the jury brought in a verdict of guilty because the testimony of the prosecuting witness lacked corroboration.

3. The trial court erred in failing to permit the defense to introduce testimony showing hostility between the prosecuting witness and the defendant's wife.

4. The trial court erred in permitting testimony of a collateral unrelated crime to be introduced. That the introduction of such testimony was highly prejudicial to the defendant and constitutes reversible error.

5. The trial court erred in commenting to the great prejudice of the defendant on various phases of the evidence thereby preventing the defendant from having a fair trial. The appellant assigns as error particularly the comment of the trial judge concerning the location of the defendant's fishing vessel at the time of an alleged act of sexual im-

propriety with the prosecuting witness. The trial judge's comment that the presence of the defendant at the time when the prosecuting witness made a retraction of the accusations against the defendant implied coercion and undue influence.

6. The trial court committed reversible error in striking the testimony of the witness Orville C. Johnson concerning bad reputation of the prosecuting witness for veracity and striking the testimony of the witness Robert E. Baer concerning the bad reputation of the prosecutrix for veracity.

7. The trial court committed plain error affecting substantial rights of the defendant by permitting an expert witness to express an opinion as to the veracity of the prosecuting witness.

8. The trial court committed plain error affecting substantial rights of the defendant in excluding testimony of admissions made by the prosecuting witness to other witnesses relating to the reason why the prosecuting witness had made the original charges against the defendant and why she was willing to drop these charges prior to her making a sworn retraction of the charges against the defendant.

9. The trial court committed plain error affecting substantial rights of the defendant by excluding testimony showing motive on the part of the prosecutrix for making the charges against the defendant and by excluding testimony of the relationship between the child and her adopted parents.

10. The trial court committed plain error affecting the substantial rights of the defendant by strik-

ing testimony of expert witness called by the defendant showing the significance of a rudimentary hymen.

11. The trial court committed reversible error affecting substantial rights of the defendant in giving instruction number 3. Particularly, the portion of instruction number 3 stating that it is undisputed that the crimes were committed at or about the times and places alleged in the various counts contained in the indictment. That the giving of said instruction constitutes a comment on the evidence contrary to legal principles as applicable.

12. The trial court committed reversible error in submitting over objection instruction number 8A to the jury defining the application of the testimony given by the prosecutrix while under the influence of sodium pentathol. That said instruction is contrary to law.

13. The trial court committed plain error affecting substantial rights of the defendant in submitting instruction number 13 singling out the credibility to be attached to the testimony of the defendant. That said instruction is contrary to law and constitutes a comment on the evidence highly prejudicial to the defendant.

/s/ PHILIP W. SCHOEL,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 18, 1955. Paul P. O'Brien, Clerk.

**United States Court of Appeals
For the Ninth Circuit**

ROLLAND LINDSEY, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, FIRST DIVISION

BRIEF OF APPELLANT

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JUL 29 1955

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PAUL P. O'BRIEN, CLERK

United States Court of Appeals
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INDEX

	<i>Page</i>
Jurisdiction	1
Statement of the Case.....	2
Statement of Questions Involved.....	11
Specification of Errors.....	13
Argument	17
I. The trial court erred in permitting a psychiatrist to give his opinion on the credibility of the prosecutrix based upon a sodium pentothal interview and erred in admitting a recording of the interview.	
(a) Such tests lack scientific validity;	
(b) The recording constitutes inadmissible hearsay;	
(c) Counsel is deprived of right of cross-examination and the constitutional right of defendant to confrontation is violated;	
(d) Statements uttered while under the influence of a drug are involuntary.....	17
II. The giving of Instruction No. 8-A was error because the instruction is predicated upon the admissibility of the sodium pentothal recording. The recording does not constitute a previous consistent statement and the instruction defines impeachment erroneously	34
III. Appellant is entitled to judgment of acquittal on the ground that the testimony of the prosecutrix lacks sufficient corroboration....	36
IV. The United States District Attorney committed misconduct in repeatedly attempting to bring before the jury evidence of independent collateral crimes of the appellant..	44
V. The trial court comments that the relationship between the appellant and the prosecutrix implied coercion and undue influence	

with reference to the retraction of the prosecutrix constitutes reversible error.....	49
VI. The trial court erred in striking the testimony of all character witnesses testifying to bad reputation of the prosecutrix.....	53
VII. The trial court erroneously restricted and prohibited appellant and his wife from showing hostility of prosecutrix and motive of latter for fabricating accusations against appellant	54
Conclusion	55

Appendices

A. APPENDIX "A"—Complete copy of sworn retraction of accusations against appellant (Dft's Exh. "B"; R. 341-347).....	57
B. APPENDIX "B"—Complete copy of Sodium Pentothal interview of prosecutrix by Dr. Anderson (R. 385-399)	63
C. APPENDIX "C"—Excerpts from law review article, 62 Yale Law Review 315, "Drug-induced Revelation and Criminal Investigation".....	79

TABLE OF CASES

<i>Curtis v. Rives</i> , 123 F.(2d) 936	33
<i>Delaney v. U.S.</i> , 263 U.S. 586, 68 L.ed. 462.....	32
<i>Dowdy v. United States</i> , 46 F.(2d) 417.....	24, 25, 36
<i>Ewing v. U.S.</i> , 135 F.(2d) 633.....	43
<i>Henderson v. State</i> (Criminal Court of Appeals, State of Oklahoma) 230 P.(2d) 495.....	26
<i>Kidwell v. United States</i> , 38 Appeal Cases, District of Columbia, 566.....	12, 42, 43
<i>Quercia v. U.S.</i> , 289 U.S. 466, 77 L.ed. 1321.....	52
<i>State v. Lindemuth</i> (N.M.) 243 P.(2d) 325.....	31
<i>State v. Lowry</i> (Kansas) 185 P.(2d) 147.....	27
<i>United States v. Douglas</i> (C.A. 7) 155 F.(2d) 894....	33
<i>United States v. Sherman</i> , 171 F.(2d) 619.....	22
<i>Williams v. U.S.</i> , 93 F.(2d) 685.....	51

TEXTBOOKS

	<i>Page</i>
60 A.L.R. 1124	42
60 A.L.R. 1124-2255	36
60 A.L.R. 1144	42
60 A.L.R. 1148	42
140 A.L.R. 21 to 186	20
140 A.L.R. 49	20
140 A.L.R. 72	20
140 A.L.R. 117	21
140 A.L.R. 165	22
167 A.L.R. 565-628	48
167 A.L.R. 567-570	48
167 A.L.R. 588-590	48
23 A.L.R.(2d) 1310	26
23 A.L.R.(2d) 1306-1311	26
15 Cal. Law Review 484 (1926).....	27
“Handbook of the Laws of Evidence,” Charles T. McCormick, West Publishing Co. (1954), para. 175, p. 374.....	28
Journal of Criminal Law and Criminology (1949) Vol. XL, 370, “The Judicial Use of Psychonarco- sis in France”.....	29, 30
14 University of Chicago Law Review 601, “Legal Aspects of Drug-induced Statements”.....	30
62 Yale Law Journal 315 (1952-1953), “Drug- induced Revelation and Criminal Investiga- tion”	28, 79

STATUTES

ACLA 64-4-12	1
ACLA 65-9-10	1
SLA, 1953, Ch. 81.....	1
48 U.S.C. §101	1

CONSTITUTION

United States Constitution	
Art. VI	32
Fifth Amendment	11, 17
Sixth Amendment	11, 17

COURT RULES*Page*

Federal Rules of Criminal Procedure

Rule 37	2
Rule 39	2
Rule 52(b)	12, 13
Rule 54	1

United States Court of Appeals

For the Ninth Circuit

ROLLAND LINDSEY,	<i>Appellant,</i>	} No. 14739
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

UPON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, FIRST DIVISION

BRIEF OF APPELLANT

JURISDICTION

The Grand Jury of the District Court of United States for the Territory of Alaska, First Division, returned a true bill, charging appellant with three counts of statutory rape and three counts of sodomy alleged to have been committed October 22, 1951, October 23, 1952, and February 27, 1954, respectively, at Ketchikan, Alaska (Violation of 65-4-12 ACLA and 65-9-10 ACLA, 1949; R. 3-5). Count 7 of the indictment charged appellant with violation, Ch. 81, SLA, 1953 (R. 4-5), influencing witness. Appellant by the verdict of the jury was acquitted on Count 7 and therefore no further reference will be made to this Count (R. 6). The appellant was arraigned and entered a plea of not guilty (R. 5). The Federal District Court acquired jurisdiction pursuant to Title 48, Sec. 101 USC and the case was tried in the District Court in accordance with the provisions of Title 18, Rule 54 of Federal Rules of Criminal Procedure. After a trial before a jury which lasted several

[1]

[Italics, wherever used in this brief, are ours]

days, a verdict of guilty on the six counts of statutory rape and sodomy was returned by the jury (R. 6). On December 3, 1954, the appellant was sentenced for a period of 12 years on the rape counts (R. 8) and for a period of 10 years on the sodomy counts, the sentences to run concurrently (R. 8). The following day appellant duly gave notice of appeal from the judgment and sentence. Appellant upon motion and order was admitted to bail, pending appeal before this court (R. 8, 9).

This appeal is being prosecuted pursuant to Rule 37 of the Federal Rules of Criminal Procedure and was perfected in accordance with the provisions of Rule 39 of the Federal Rules of Criminal Procedure and the rules of the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

In view of the fact that appellant in his Statement of Points, challenges the sufficiency of the evidence on the ground of lack of the requisite quantum of corroboration (R. 528) appellant deems it advisable to set forth briefly the material testimony of the key witnesses.

The prosecuting witness was 15 years old at the time of the trial (R. 18, 19). She was adopted by the appellant during 1946 or 1947, and lived at the appellant's home with her brother, who is 2 years older, since she reached the age of seven (R. 19, 206). She testified that from the age of 7 onward the appellant engaged in conduct of systematic seduction and debauchery with her (R. 20-23), beginning with his touching of her female organs, followed, subsequently, by acts of

cunnilingus and fellatio and terminating ultimately in sexual intercourse (R. 20-24).

She testified that appellant first attempted to have intercourse with her when she had reached the age of 9 years on appellant's fishing boat, but that the attempt was unsuccessful because of the smallness of her sexual organs (R. 22, 23). She testified that appellant first succeeded in full penetration on October 22, 1951, the day upon which appellant's youngest child was born, while appellant's wife was in the hospital (R. 24). On that occasion she testified that the appellant also committed cunnilingus and had her commit fellatio upon him (R. 26, 70).

She testified that on October 23, 1952, the appellant again raped her and committed sodomous acts upon and with her (R. 29, 71, 72). October 23, 1952, was the date of the birth of appellant's second child and again appellant's wife was confined at a hospital on that day (R. 27, 28). She further testified that on February 27, 1954, the appellant again raped her and committed sodomous acts upon and with her (R. 31). This was the date on which appellant's wife gave birth, in a hospital, to appellant's third child. She further testified that subsequent to October 2, 1951, the appellant had intercourse with her on many occasions at appellant's home, during morning hours, during the day, during evening hours, in her bedroom, in his bedroom and on appellant's fishing boat (R. 72, 73). She testified that appellant had intercourse with her for the last time on March 30, 1954 (R. 36). She then stated that a few days following March 30, 1954, appellant again attempted to

have intercourse with her, but that she cried and then went to the witness, Riewold, to collect wages due her for baby-sitting. On that occasion she called up her previous adoptive mother, in Seattle. For the first time she then stated to Mr. Riewold that the appellant had abused her sexually (R. 37). On or about April 10, 1954, she told, for the first time, to the witness, Riewold, to her brother, to her aunt and to many others that appellant had had sexual relations with her and had committed sodomous acts (R. 38). After she made this statement to Mr. Riewold, she left appellant's home and stayed with her grandmother and a few days later, at the request of the Welfare Dept. of the Territory of Alaska (R. 59), she was sent from Ketchikan to Wrangel to stay at the home of the Federal Marshall. She testified on direct examination that after she had stayed with the Federal Marshall and his wife for four months, she falsely accused the Marshall of having had sexual relations with her. She told his wife that she was pregnant and falsely accused him of having caused her to become pregnant (R. 40, 41). At that time she told the Marshall and his wife that the accusations, which she had made against the appellant were false and untrue and she wrote three letters to appellant, to appellant's wife and to appellant's children asking all of them for forgiveness (R. 40, 90, 92; Defendant's Exhibit "A," three letters).

She advised the Marshall that she wished to drop the charges against the appellant and return to Ketchikan. She arrived at appellant's home before her letters, which she had written at Wrangel (R. 42). She testified (R. 40):

Q. (By MR. MUNSON): You said that wasn't true?

A. Yes. [34]

Q. Why did you say a thing like that?

Q. Did you write Mr. Lindsey?

A. Yes, I did.

Q. And what did you tell him?

A. *I told him that I was coming back here to drop all charges that I made because they weren't true, and I got here before the letter did.*

Q. How did you get back here?

A. Well, the only thing I could think of was, *I accused Mr. Krepps of having had intercourse with me when he hadn't, but that was the only thing I could think of to come back . . .*

A. Well, because that was the only way I could think of I could get back here to my Mom and the kids.

Q. Well, did you tell them that it wasn't true?

A. My Mom and Dad?

Q. I mean, Jack and Mrs. Krepps.

A. Yes, I did.

Q. What was your accusation; what did you say, and who did you say it to?

A. I told it to Judy.

Q. And what did you say?

MR. ZIEGLER: Told it to whom?

A. Mrs. Krepps. And I told her that—*well, I made up a big story—that I wouldn't be surprised if I was pregnant, and she said, "Why?" And I said, "Oh, I don't know. I just have a feeling." And she said, "Do I know who did it?" And I said,*

“Yes.” And she said, “How well do I knew that person?” And I said, “Pretty well.” And she went into the house and called up Jack and had him come home.

MR. ZIEGLER: Jack Krepps, do you mean?

A. Yes.

She told appellant that she would drop the charges. He then took her to his attorney's office where, in the presence of the son of appellant's trial attorney, his secretary and the appellant, she was interrogated and gave a full retraction, withdrawing all accusations against appellant (R. 42, 43, 188-206; Appellant's Exhibit “B”; R. 341-347).

See Appendix “A”:

On cross-examination she admitted that she also had told her welfare worker that her accusations against appellant were untrue (R. 54). She further admitted that on many occasions during the 5 years preceding the trial, she had run away from the home of her adoptive parents (R. 93, 94). She testified that because of various delinquent acts committed by her, her adoptive parents, prior to the time she made the accusations against the appellant in 1954, had threatened to send her away from home to a correctional institution (R. 95, 96). She testified that the appellant committed many of the acts of which she accused him while her older brother and her mother were at home (R. 102, 103). She stated that prior to the time she signed the retraction under oath (Appellant's Exhibit “B”; Appendix “A”) the Federal Marshall had explained to her the meaning and significance of perjury (R. 104).

The older brother of the prosecutrix also testified as a prosecution witness. He stated that on several occasions the appellant, during the early morning hours, would look into his bedroom to see if he were asleep, and then would enter his sister's bedroom (R. 111). He stated that on some occasions when he would see her, afterwards she would have tears in her eyes (R. 111-114). He also testified that on one occasion when the appellant and his sister were alone on the boat, he saw the boat drifting in the bay. He also stated that his sister showed him certain cotton chair stuffing, which she claimed contained sperm (R. 117, 129). He further testified that he found a can filled with rubber contraceptives on the rafters between his sister's and his room (R. 118). On cross-examination he admitted that he had run away from the home 7 or 8 times because he could not get along with his adoptive mother (R. 121). On cross-examination he further admitted that all he found was an empty contraceptive container (R. 129).

The witness, Don Riewold, testified that on April 10 or 13, 1954, the prosecutrix came to his home crying and accused appellant of rape and perverted sexual practices (R. 137). The witness, Florence Dalton, appellant's sister-in-law, likewise testified that prior to Easter, 1954, the prosecutrix had told her of her sexual relations with appellant including the latter's abnormal conduct (R. 144, 145). Dr. Anderson, a psychiatrist, testified that on April 28, 1954, the prosecutrix told him of the sodomous relations with appellant (R. 149).

Dr. Stagg testified that on April 23, 1954, he conducted a medical examination of the prosecutrix and

found that she had a fully developed vagina, relaxed like that of a married woman, accustomed to sexual intercourse (R. 152).

The witnesses called by appellant testified as follows: Lydia Pawsey, appellant's mother-in-law (R. 157), testified that the prosecutrix came to her home during April, 1954, and accused appellant of having raped her (R. 159, 160). That she took the prosecutrix to appellant's home, who was not present, and she accused her father of having raped her in the presence of appellant's wife (R. 166). She further testified that on the same day, the brother of the prosecutrix presented an empty container of contraceptives and claimed that this was the evidence. She further stated that the prosecutrix desired to go to Seattle to live with her previous adoptive mother (R. 178, 179). She testified that upon a search being conducted by her son and the brother of the prosecutrix, no cotton was produced (R. 182).

Pat Pawsey, the brother of appellant's wife (R. 184), testified that when the prosecutrix came to his mother's home during April, 1954, after she had run away from home, she stated (R. 184): "A. She told Mom and I that Rollie *tried* to rape her three times when she came in the house. Q. She said that Rollie had *tried* to rape her three times? A. Yes." He further stated that upon a search of appellant's premises neither cotton nor contraceptives were found (R. 186).

Appellant's wife testified that they adopted the prosecutrix and her brother in 1946 or 1947. That her brother Bob had been delinquent and had spent several months at Boys' Town (R. 207). That during April, 1954, the

prosecutrix for the first time, made any charges against the appellant (R. 211). That during August, 1954, when prosecutrix returned from Wrangel, she stated that she wanted to drop the charges against the appellant because they were untrue (R. 223). She further testified that she never saw any evidence of improper acts between the appellant and the prosecutrix (R. 229). She further stated that upon a search of the house being made, the cotton mentioned by the prosecutrix was not found (R. 239).

The appellant testified that he was fisherman, a logger and a trapper (R. 245), 41 years of age (R. 340); that the prosecutrix on many occasions had committed thefts at appellant's home (R. 246); that she had stolen as much as \$100.00 at a time (R. 258), and had been punished by restrictions preventing her from going to dances, church and shows. That upon many occasions she would be very hostile and that shortly before the accusations were made against him he had punished her physically when she talked back to her mother (R. 263, 264). He also stated that shortly before the accusations were leveled against him by the prosecutrix, she was defiant of parental authority and would disregard his commands (R. 265-267). He further stated that he never entered the room of the prosecutrix early in the mornings, that he never made any immoral advances toward her and never committed any immoral acts with her, either in the home, or on the boat (R. 292, 294, 306). He testified that two and a half weeks before the prosecutrix and her brother left his home by running away, he found contraceptives belonging to her brother, Bob (R. 307, 308).

Several character witnesses testified that the prosecutrix had a bad reputation for truth and veracity (R. 350-370).

Dr. Anderson was called as a rebuttal witness by the Government, and testified that he was the only practicing psychiatrist in the Territory of Alaska (R. 374). That he had examined the prosecutrix on April 28, October 6 and 7, 1954, and that on the 8th day of October he gave her a sodium pentathol interview. He stated that this test was recognized by his profession as being highly reliable (R. 377). The test was given in the presence of the District Attorney, a psychologist, and a psychiatrist case worker (R. 382). Over vigorous objection on the part of Defense Counsel, the Court permitted the recording of the sodium pentothal interview of the prosecutrix to be played to the jury (R. 383, 385-401). He further testified that the prosecutrix, while under the influence of the drug, was telling the truth (R. 400), and said it was inconceivable that she had gained the information disclosed by her in any manner other than by actual experience (R. 401, 402). He further stated that while under the influence of sodium pentothal, she was bound to tell the truth (R. 402). It appears that the United States District Attorney participated in the questioning of the prosecutrix during the sodium pentothal interview (R. 404). The Trial Court refused to permit appellant to undergo the same test (R. 418). The appellant called in rebuttal, Dr. Clark, a practicing general physician (R. 426). He testified that sodium pentothal was not a truth serum and that it was not medically accepted as a truth

inducing drug, and that it was not reliable as a means of finding out whether a witness was telling the truth or a falsehood (R. 427, 429, 440).

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court commit reversible error in permitting to be introduced over objection into evidence a recording of a sodium pentothal interview of the prosecutrix which was taken several weeks subsequent to the time after she had retracted under oath the charges previously made by her against the appellant before the grand jury? Is such evidence admissible as a previous consistent statement for the purpose of corroborating an impeached prosecutrix? Does such evidence constitute inadmissible hearsay? Does the admission of such testimony deprive the defendant of the right to cross-examination and does it deprive the defendant of the right to be confronted with witnesses against him pursuant to the 5th and 6th Amendments to the Constitution of the United States? Does a witness subjected to the influence of sodium pentothal testify voluntarily?

2. May a psychiatrist over objection be permitted to relate to the jury the result of a sodium pentothal test administered to the prosecutrix and may a psychiatrist be allowed to testify that testimony elicited from a witness while under the influence of sodium pentothal would prevent the witness from lying and that the testimony elicited is guaranteed to be truthful?

3. Did the giving of Instruction No. 8-A over objection on the ground that such instruction was predicated

upon admission of incompetent testimony, i.e., evidence of the witness while under the influence of sodium pentothal, constitute reversible error? Was Instruction No. 8-A supported by evidence contained in the record, i.e., was the evidence of the testimony elicited of the prosecutrix upon which this instruction is based a *previous* consistent statement? Is Instruction No. 8-A contradictory and misleading to appellant's prejudice?

4. Was the testimony of the prosecutrix sufficiently corroborated so as to comply with the rule announced in the case of *Kidwell v. United States*, 38 Appeal Cases, Dist. of Columbia, 566, 573? This point is raised for the first time on this appeal and is predicated upon the "plain error" provision contained in Rule 52(b) of the Federal Rules of Criminal Procedure.

5. Did the trial court commit reversible error in admitting evidence pertaining to an alleged collateral crime of appellant and did the United States District Attorney commit reversible error in seeking to introduce testimony of a collateral crime allegedly committed by the appellant? This point is raised for the first time on this appeal and is predicated on the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure.

6. Did the comment of the trial judge to the effect that the relationship between appellant and prosecutrix implied coercion in obtaining the retraction of the prosecutrix constitute reversible error? Did the action of the trial court in striking the testimony of character witnesses impeaching the character of the prosecutrix constitute reversible error? Did the trial court commit

reversible error in restricting the defendant to showing of hostility between himself and the prosecutrix to the thirty days immediately preceding the making of the accusations against the defendant constitute reversible error? Did the trial court's ruling preventing the defendant from showing hostility existing between the prosecutrix and the defendant's wife constitute reversible error? Did all of the points raised in this paragraph deprive the defendant from having a fair trial? All of the points raised in this paragraph are predicated on the "plain error" provision of Rule 52(b) of the Federal Rules of Criminal Procedure.

SPECIFICATION OF ERRORS

1. The trial court erred in admitting a psychiatrist to testify over objection concerning the results of a sodium pentothal test given to the prosecutrix and the trial court erred in permitting to be played to the jury a recording of the sodium pentothal interview (R. 389 to 399). The attorney for the defendant objected to the psychiatrist being permitted to relate the results of the sodium pentothal interview and to the introduction of the recording while the prosecutrix was under the influence of sodium pentothal on the ground that the proffered evidence was incompetent, irrelevant and immaterial, that the validity of this procedure of examination was not recognized by scientists and that the opinion of the psychiatrist invaded the ultimate province of the jury (R. 375, 376, 379, 383). The substance of the evidence admitted is as follows: (1) The psychiatrist testified that the prosecutrix while under the influence of sodium pentothal could not fail, but tell the truth and

did tell the truth; (2) The recording admitted substantially constitutes a complete reiteration of the testimony of the prosecutrix on direct examination of the relationship between herself and the appellant and the alleged criminal conduct of the appellant toward her.

2. The trial court erred in submitting to the jury Instruction No. 8-A (R. 461-462; particularly the following portions thereof):

“You are instructed that a witness may be impeached by proof that before testifying he made statements inconsistent with, or contradictory of, his testimony. But he may also be sustained or corroborated and the impeachment *overcome by evidence that at some time prior to the making of the inconsistent or contradictory statements, he has made statements consistent with his testimony.* In this case evidence consisting of four letters and a sworn statement, has been introduced to show that the witness, Loretta Lindsey, has previously made statements inconsistent with, and contradictory of, her testimony. To rebut or overcome this evidence, *and to sustain and corroborate this witness, evidence was introduced to show that the witness, while under the influence of a drug which it is contended rendered her powerless to lie, made statements identical or consistent with her testimony.*

“As to all this evidence you are instructed that if you find that the four letters and the sworn statements are untrue, or the statements in them were falsely made, you should disregard them. *But if you find to the contrary, you will then determine whether she has been impeached,* and in this connection you are instructed that you may find that she *has or has not been impeached.* If you find that she has been impeached, you will then consider

whether she has been sustained or *corroborated by the statements made by her while under the influence of the drug referred to.*”

Appellant’s counsel objected to the giving of this instruction on the ground that the instruction was predicated on the introduction of inadmissible evidence, *i.e.*, the testimony of the prosecutrix while she was under the influence of sodium pentothal (R. 449). Appellant for the first time here raises the additional point that the instruction is erroneous because the recording did not constitute a *previous* consistent statement and, further, that the portion of the instruction quoted contains inherently contradictory elements misleading the jury as to the meaning of the word “impeachment.”

3. The indictment should be dismissed and appellant should be discharged from further prosecution on the ground that the testimony of the prosecutrix is not sufficiently corroborated.

4. The United States District Attorney was guilty of misconduct constituting reversible error in succeeding in bringing repeatedly before the jury evidence of alleged sexual criminal misconduct of appellant with a third party (R. 145, 371, 395). The substance of the testimony complained of is that the defendant, many years previous to the dates relied on in the indictment of the instant case, had attempted to commit statutory rape upon his sister-in-law. In each instance where the prosecutor attempted to introduce such testimony of a totally unrelated collateral crime, objection of defense counsel was sustained, but prejudice to appellant had resulted (R. 145, 371, 395).

5. The trial court committed reversible error in repeatedly commenting on the evidence to the great prejudice of appellant. The trial court on several occasions stated that Defendant's Exhibit B (See Appendix A), consisting of the sworn retraction of all charges made by the prosecutrix, was a result of implied coercion and implied undue influence practiced by appellant upon the prosecutrix. The prejudicial comments of the trial court are found as follows: (R. 193, 194, 196, 198.) No objection was made to the trial judge's comments at the time of the trial.

6. The trial court erred in striking the testimony of all character witnesses impeaching the reputation of the prosecutrix for truth and veracity (R. 352, 359, 361, 364, 369). The trial court erred in limiting showing of hostility between appellant and the prosecutrix to the thirty days immediately preceding the bringing of charges by the prosecutrix against appellant (R. 259). The trial court erred in preventing appellant and preventing appellant's wife from introducing evidence showing hostility existing between the prosecutrix and appellant's wife (R. 216, 217).

ARGUMENT

- I. The evidence of the testimony submitted to the jury by a recording of the interview of the prosecutrix while she was under the influence of sodium pentothal was inadmissible to corroborate the prosecutrix and the psychiatrist should not have been permitted to relate to the jury the results of the sodium pentothal interview because such tests are unreliable and no court within the 48 states or within the federal jurisdiction has ever permitted such a recording to be introduced.
 - a. The admission of such testimony constitutes reversible error because it is highly prejudicial to the defendant in that it merely repeats the testimony given by the witness during her examination in chief.
 - b. Testimony given by a witness while under the influence of sodium pentothal is inadmissible because both legal and medical authorities are agreed that such testimony does not bear the earmarks of a guaranty of truth, but, on the contrary, is unreliable and its use has never been sanctioned by any appellate court. A witness while under the influence of sodium pentothal is open to suggestion and if the individual is neurotic or psychotic, the interrogation will evoke fantasies rather than a true picture of the events related by a witness.
 - c. Since the witness interviewed in this manner subsequently will not remember the questions asked or the answers given by her, defense counsel is totally deprived of the right to cross-examination. Such deprivation constitutes a violation of the due process provisions of the 5th Amendment and of the right of confrontation of the witness under the 6th Amendment of the Constitution of the United States.
 - d. Such testimony is not voluntary testimony and is, therefore, inadmissible.

Appellant is convinced that the trial court's permitting the psychiatrist to testify as to the results of the sodium pentathol interview of the prosecutrix and the playing of the record of the interview (See Appendix B; R. 385-399) entitle appellant to a new trial irrespective of the other errors assigned on this appeal.

In the instant case, the trial court permitted the sodium pentathol recording to be admitted under the following circumstances:

During August the prosecutrix admittedly had signed a complete retraction of her accusations against appellant. The retraction was sworn to by her after she had previously admitted to the Federal Marshal, who was then her custodian, that the accusations which she had made against her father under oath before the Grand Jury were false and untrue. Admittedly, without any influence whatsoever having been brought to bear upon her on appellant's part or appellant's wife's part or any member of appellant's family, the witness wrote several letters to appellant, his wife and appellant's children asking for forgiveness (D's Ex. A). At that time she had falsely accused the Federal Marshal of improper sexual relations with her and was fully aware of the seriousness of making a false accusation under oath (R. 103, 104). She then returned from Wrangel to Ketchikan before her letters had arrived and upon going to appellant's home she immediately advised him and his wife that she would drop as being untrue her previous accusations against appellant. She was then taken by appellant to the office of his attorney. It should be stressed that there is not one iota of evidence in the

record showing that the slightest degree of undue influence was exercised upon her in order to obtain the retraction or while she was being interrogated with reference to the matters contained in the retraction. She was interrogated and a statement in question and answer form was taken of her by the son of defendant's attorney, who himself is a practicing lawyer (R. 104). After the interrogation had been concluded and after it had been transcribed within a few hours, it was then read over by her and signed by her under oath (R. 190), after the significance of the oath again had been impressed upon her mind (R. 190). The retraction (See Appendix A) of course completely impeaches the prosecutrix. There is no showing in the record that any specific answers contained in the retraction was suggested to the prosecutrix. About six weeks thereafter she was examined by the psychiatrist and was advised that a truth serum would be given to her the following day (R. 375). The questions during the interview were asked primarily by the psychiatrist and the United States District Attorney who tried the case apparently asked some of the questions. Over vigorous objection of the defense counsel, the trial court permitted the recording of the interview to be played to the jury. A reading of the recording (See Appendix B) will show that in effect the prosecutrix reiterated the identical testimony which had been given by her on direct examination. A hearing of the record unquestionably will convince this court of the dramatic effect it must have had upon the jury. While it is true that the trial court later instructed the jury (Instruction No. 8-A) that

the recording was not substantive evidence, but was admitted solely for the purpose of eliminating the impeaching effect of the retraction, it is submitted that the distinction made by the trial court is one too subtle to be appreciated under the dramatic circumstances by the ordinary men and women constituting the jury. The reverberating sounds of the accusatory tones no doubt overcame the distinction between "substantive and other evidence."

The subject matter of the admissibility of a statement to rehabilitate an impeached witness is discussed at length in an exhaustive annotation contained in 140 A.L.R. 21 to 186. A reading of this annotation clearly shows that in a majority of jurisdictions such statements are held to be inadmissible *under any circumstances*. The writer of this annotation states, at page 49:

"The weight of authority is to the effect that when the credibility of a witness is assailed because, on some former occasion, he has made statements that differ from his statements under oath at the trial, his sworn testimony may not be corroborated by proof that on other occasions and at other times his statements were in harmony with his testimony."

In those jurisdictions which do allow such statements of a witness to be introduced, it is clear that it is a requirement that the consistent statement must precede the statement by which the witness has been impeached. Thus the writer of the annotation comments, at page 72:

"Even in jurisdictions which permit either generally or under some circumstances the introduc-

tion in evidence of statements consistent with the testimony of a witness impeached by proof of having made inconsistent statements, *it has been held that such consistent statements, to be admissible, must have been made prior to the statements by which the witness was impeached.*”

In addition, in those jurisdictions which allow such a statement to be used to rehabilitate an impeached witness, a showing must be made that at the time of the making of the rehabilitating statement the witness had no motive to falsify, bias or interest. Thus the writer of the annotation remarks at page 117:

“Inherent in the exceptions to the general rule that prior statements consistent with the testimony of an impeached witness are inadmissible in support of his credibility, that pertain when the witness has been impeached on the ground of motive to falsify, bias, or interest, or by a charge of recent fabrication of his testimony, is the requirement when the alleged motive to falsify did not exist, or when the ultimate effect of the statement could not have been foreseen.”

In the instant case, the prosecutrix, being fully aware at the time the statement was made of the fact that she might be subjected to perjury charges, had, of course, all the reason in the world to falsify and to lie.

Finally, it has been pointed out that such a statement for the purpose of rehabilitation must be made voluntarily. Thus, the writer of the annotation states, at page 165:

“A statement made under duress is not, under any circumstances, admissible in corroboration of impeached testimony . . .”

It is difficult to see how a statement given under the influence of sodium pentothal may be considered to be a *voluntary* statement.

It should be noted that the Federal courts have followed the rule rejecting in toto previous consistent statements used to rehabilitate an impeached witness. The precise issue was presented in the case of *United States v. Sherman*, 171 F.(2d) 619, decided unanimously by the appellate court. It appears that in the *Sherman* case where the defendants had been charged with larceny and transportation of stolen goods, a witness implicated in the theft in a statement given to the F.B.I. had not mentioned the defendant Sherman as a participant in the crime. At the trial, this witness implicated the defendant Sherman and stated that he had participated in the commission of the crime. Sherman then succeeded in having introduced the first statement given by this witness to the F.B.I. The trial judge then permitted the prosecution to introduce a subsequent second statement wherein this witness had implicated the defendant Sherman. Reversing the conviction as to the defendant Sherman, the Circuit Court of Appeals, in a carefully reasoned decision prepared by L. Hand, held as follows (p. 621):

“ . . . Sherman put in the written statement to impeach this testimony; and to break the force of the impeachment the judge allowed the prosecution to get before the jury part of the contents of a second written statement, made by Oliva to an officer a few weeks after the first, in which he told the story as he had testified on the stand.

“Concededly the second statement was not competent unless the admission of the impeaching

statement made it so, for when Oliva made it he had the same motive to fabricate—the hope of lenity—that he had while on the stand.

“Rationally, it is true, the fact that he changed his story so soon after making the contradictory statement, may have added to the persuasiveness of his testimony; and for that matter most persons would probably consider any earlier consistent account, in some measure at least, confirmatory of a witness’s testimony. *The reason for its exclusion is because it has not been made on oath rather than because it had no probative value*, although courts have often spoken as though it had none. *However, such a statement is as incompetent when the witness has been impeached by an inconsistent statement, as when he has not been.* So the Supreme Court decided many years ago.

“And although the point has apparently never come up again in that court, the lower federal courts have several times applied or recognized the doctrine.

“It is true that, when the witness’s testimony was not impeached, but only ‘aspersed’ by the defendant’s counsel, we held that the admission of such a corroboratory statement was harmless error, but we should scarcely have warrant for doing so here. Sherman’s connection with the stealing of the truck was of course crucial under the first count, and nearly so under the third. Oliva’s failure to include him in his first version might well have thrown doubt upon his later testimony; and, as we have just said, his early correction of that version was, rationally, not an inconsiderable circumstance. The prosecutor certainly thought so, for he used it in summing up the case to the jury. We cannot be certain that it made no difference in the verdict,

and Sherman's conviction must be reversed and the cause remanded as to him. . . ."

See, also, the decision in *Dowdy v. United States*, 46 F.(2d) 417, where a judgment of conviction was reversed on the ground that the trial court had erroneously permitted the prosecution to introduce previous consistent statements of an impeached witness and hearsay statements of admissions of the defendant. It should be noted that in that case the decision was reversed although the trial court had specifically instructed the jury that such hearsay statements were admitted only for the purpose of corroboration. The Circuit Court of Appeals for the 4th Circuit ruled at page 425:

" . . . But assuming, however, that it was admitted for that purpose, and that the jury were sufficiently cautioned, nevertheless we do not think that it was admissible. Martin had been arrested on numerous charges which were then pending. The National Prohibition Act itself (tit. 2, §30 (U.S. Code, title 27, §47, 27 USCA §47)) gave him immunity if he should testify. In view of all the surrounding circumstances, it is obvious that a motive to testify falsely existed then fully as much as it did at the time of the trial. The conversation in which the statements were made did not occur soon after the transactions that he detailed, but long afterwards. Nor do we think that statements made in such circumstances would reasonably furnish the jury a test of the witness's integrity and accuracy of recollection. As already stated, these statements were nothing more than a confession implicating others; and to allow such evidence to go to the jury would not only be exceedingly dangerous

to the innocent, but subversive of the fundamental rights of the accused in a criminal trial.”

and, at page 427, as follows:

“But we cannot overcome the impression that permitting Trexler to testify in detail to all of Martin’s various and lengthy statements to him, implicating Funk, must have been prejudicial. It is true that Martin testified practically to all of these same matters upon the witness stand; and to a discriminating mind, the fact that Martin had made the same statements to Trexler that he made upon the stand might not have added any weight to his testimony. But jurors are not trained in such matters. The testimony was admitted ‘as corroborating Martin,’ *and the jury must have received the impression that it had that effect.* We are of the opinion therefore that the admission of this testimony was prejudicial error, and the judgment against Funk must be reversed and a new trial granted him, but on that ground alone.”

It having been demonstrated that quite apart from the witness having been under the influence of sodium pentothal the rehabilitating statement was inadmissible, appellant next contends that Dr. Anderson, the psychiatrist, should not have been permitted to express his opinion as to the credibility of the prosecutrix because of the unreliability of the sodium pentothal test and that the recorded interview was inadmissible.

Various state and federal courts during recent years had to meet the problem of deciding whether the results of such tests are admissible. In most instances, requests for admission were made by defendants who offered to introduce into evidence the results of lie-detector tests or sodium pentothal or sodium amytal tests. It should

be stressed that to the knowledge of the writers of this brief there is not one single instance where any appellate court within any of the forty-eight states of the United States or within the federal jurisdiction has ever sanctioned the admission of such testimony—perhaps with the exception that in one or two instances the results of such tests were admitted where previous to the trial counsel on both sides had expressly stipulated that the results of such tests could be admitted in evidence. Recent cases on the point under consideration are collected in an annotation in 23 A.L.R.(2d) 1306-1311, entitled “Physiological or Psychological Truth and Deception Tests.” Summarizing the conclusion to be deduced from the cases noted in this annotation, the writer of the annotation succinctly states at page 1310:

“Truth serum tests occupy much the same position as lie detector tests, and no court has as yet recognized the admissibility of the results of such tests.”

In the case of *Henderson v. State* (Criminal Court of Appeals of the State of Oklahoma) 230 P.(2d) 495, the defendant, who had been convicted of forcible rape, contended on appeal that the trial court had committed reversible error in excluding the results of lie detector and truth serum tests which had been taken by the defendant. Negating this contention, the court, reviewing a great many of the scientific articles on the subject of sodium pentothal and the precedents established concerning the use of the results of testimony derived from lie detector and truth serum tests (pages 501-506) stated unequivocally at page 505:

“As to the truth serum tests, it is even more experimental than the lie detector test.”

In the case of *State v. Lowry*, 185 P.(2d) 147, the Supreme Court of the State of Kansas granted a new trial to the appealing defendant on the ground that the trial court had erroneously permitted expert testimony concerning the results of lie detector tests given to the defendant and the prosecuting witness. The expert had testified that the defendant, according to the tests, lied and that the prosecuting witness told the truth. In this well reasoned decision the Supreme Court of Kansas recognized the following dangers incident to the admission of the results of such tests: (1) That a party might introduce only those tests favorable to him and the opponent would be deprived of cross-examining the witness while he is being tested; (2) that it would be difficult to expose an incompetent or dishonest expert (page 152). The court decided that since the results of the lie detector tests went to the heart of the controversy, *i.e.*, the respective credibility to be attached to the defendant and the prosecuting witness, the defendant had been highly prejudiced by the admission of this testimony and was entitled to a new trial.

The skepticism concerning the scientific potentialities of sodium pentothal as a truth-evoking serum, which has prevented courts from admitting the results of sodium pentothal or sodium amytal tests is fully shared by numerous authorities in the field of forensic medicine. It should be noted that C. T. McCormick, one of the outstanding writers in the evidence field, in an article written during 1926 in 15 Cal. Law Review 484 entitled "Deception Tests and the Law of Evidence" remarked concerning the use of scopolamin, an anesthetic

used for the same purpose as sodium pentothal and sodium amytal (p. 503):

“The use of drugs to produce a state where conscious suppression is impossible has not won acceptance even in theory.”

In his recently published treatise, “Handbook of the Law of Evidence,” Charles T. McCormick, West Publishing Company, 1954, Para. 175, p. 375, the same writer, after having watched the progress of the use of sodium pentothal and amytal for twenty years, arrives at the following conclusion (p. 374):

“Defendants so far have offered such drug-induced statements without avail. Since this technique is even more clearly in the experimental stage than the lie detector method, judicial notice of its validity could not be accorded. . . . ”

Two faculty members of the Yale School of Medicine and two faculty members of the Yale School of Law jointly prepared an article entitled, “Drug Induced Revelation and Criminal Investigation,” 62 Yale Law Jrnl. 315 (1952-1953). After a thorough explanation of the physiological and psychological aspects of sodium pentothal tests, the writers of this article arrive at the following conclusions:

1. People will not always tell the truth while under the influence of sodium pentothal.

2. Persons with neurotic tendencies are likely to substitute fantasies in place of truth and normal individuals will be able through the use of will power to resist disclosing the truth.

3. A transcript or recording of a sodium pentothal interview should not be admitted in evidence because

both judges and juries would be at a loss to evaluate the testimony presented.

4. The sciences of physiology and psychology have not progressed to a point where with or without narco-analysis (analysis of testimony given while subject under influence of sodium pentothal or similar drugs) scientists trained in these fields are able to evaluate correctly the truth or falsity of testimony of witnesses.

5. Subjects have under the influence of sodium pentothal been able to withhold correct information, have been able to distort facts and, in many instances, erroneous data were elicited through suggestion on the part of the interrogator. The writers of this brief believe that a reading of this article will prove to be of great value to the court. To enable this court to review the salient points of the article, we have taken the liberty to include excerpts therefrom in the appendix (Appendix C).

One of the leading European criminologists, in an article entitled "The Judicial Use of Psychonarcosis in France," Vol. XL, The Journal of Criminal Law and Criminology, 1949, 370, draws the following conclusions, at page 371:

"Professor Delay and the majority of psychiatrists assert that psychonarcosis is not able to check the determined will of concealing a precise point, while Dr. Scharlin, chief of the neuropsychiatric department of the Regional Hospital Department of Besancon, gives the following results of about a hundred experiments which have been undertaken under conditions similar to these which are met with in judicial matters. In 12% cases the results prove completely satisfactory; for instance, a miner subjected to narcosis said the following: 'It's

queer your stuff; makes one talk all right; the murderers need to be mighty careful with you.' In 30% cases the examination is only able to obtain precisions on secondary details, as the will controls the important answers; finally, in about 60% cases, the results are completely negative."

and, at page 380:

"In fact, the narcoexamination obtains too rarely valuable results to contemplate its use at present. And even if a superpenthotal were perfected, it would be necessary to undertake systematic research in order to train experts capable to avoid or baffle the chances of suggestion or affabulation. It is doubtful that this may be contemplated in the near future."

In a well-considered article in 14 Univ. of Chicago Law Review 601 entitled "Legal Aspects of Drug-Induced Statements," Leon M. Despres points to the following danger incident to the use of these tests (p. 604):

"... There is reduction of the critical sense, an enhancement of rapport, and often *a pouring out of both truth and fantasy equally*. . . ."

and, at page 605:

"In psychotherapy, the physician's skill depends on his obtaining recitals of internal, external, and mixed events, and on his ability to suggest developments and reconciliations. *In law, we reject for untrustworthiness a method of interrogation which mingles external events with imaginary occurrences and shapes the answers of the subject to the suggestions of the examiner.* Thus, however striking their medical uses, the drugs are not 'truth serums'; they dissolve inhibitions and tend to stimulate unrepressed expressions of external fact, of *fancy and of suggestion.*"

Appellant challenges appellee to produce legal or medical authorities substantiating the statements made by Dr. Anderson at the trial concerning the reliability of the sodium pentothal test.

Since the subject of a sodium pentothal interview, if the drug has been properly administered, is unable subsequently to recall his testimony, opposing counsel consequently is completely deprived of the only practical weapon developed in the legal arena to ascertain the truth, *i.e.*, the utilization of a probing and searching cross-examination. It is respectfully submitted that this court should not sanction the admission into evidence of a recorded sodium pentothal interview until the time has arrived when physiologists and psychologists and psychiatrists with scientific unanimity have arrived at a general consensus that this method of searching for truth has achieved such a high degree of reliability that cross-examination becomes unnecessary. We trust that the members of this court will find themselves in agreement, until such time will have arrived, with the conclusion reached by the Supreme Court of New Mexico in the case of *State v. Lindemuth*, 243 P.(2d) 325, at 336:

“Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact finder.”

It should be noted that in the *Lindemuth* case, *supra*,

the defendant's conviction was affirmed. The appellate court decided that the trial court had not committed error in refusing to permit a psychiatrist to testify concerning the results of a sodium pentothal test which had been administered to the defendant prior to the trial. In that case, as in the instant case, the psychiatrist would have testified that the witness, while under the influence of the test, told the truth.

The admission of the sodium pentothal recording at the trial not only constituted the admission of inadmissible hearsay, but, since counsel for the defendant was precluded from the right of cross-examination, we contend that the admission of the recording constitutes a violation of the 6th Amendment to the Constitution of the United States.

In the case of *Delaney v. U.S.*, 263 U.S. 586, 68 L.Ed. 462, 465, the Supreme Court of the United States recognized that the reception of hearsay testimony over objection may be serious enough to deprive a party of the right of confrontation guaranteed by Article VI of the Constitution of the United States. The court states as follows (p. 465):

“It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. *Hearsay evidence can have that effect, and its admission against objection constitute error . . .*”

It must be emphasized that the right of confrontation protected by Article VI of the United States Constitution includes the right to have witnesses give testimony in the presence of the defendant so as to afford

him an opportunity for cross-examination. See *Curtis v. Rives*, 123 F.(2d) 936, 938.

Having been totally deprived of the benefits of cross-examination of the prosecutrix while the latter was under the influence of sodium pentothal, this appellant, in effect, finds himself in the same position as the defendant did in the case of *U. S. v. Douglas*, 155 F.(2d) 894. In that case a judgment of conviction was reversed on the ground that the information charging the crime, which had been given to the jury, had attached to it an affidavit of a witness who had not been called to testify at the trial. Reversing the judgment of conviction, the Circuit Court of Appeals for the 7th Circuit ruled (p. 896):

“Furthermore, we are of the view that the question presented is too serious to go unnoticed even though it was not properly raised in the court below. Amendment VI of the Constitution of the United States provides: ‘In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ The submission to the jury of the affidavits complained of was a palpable infringement of this constitutional right.”

Finally, a witness while being examined while under the influence of sodium pentothal is definitely subject to suggestions on the part of the interrogator, as was pointed out by the writers of the articles referred to previously. It follows, therefore, that the testimony of the witness while under the influence of sodium pentothal cannot be said to be voluntary. In other words, the testimony of a witness under those circumstances should

not be accorded any more validity than testimony of a witness subject to duress or undue influence. This is an additional reason why the admitted recording was incompetent.

The court will realize that in the absence of any direct corroborating testimony and in the absence of any admissions or confessions on the part of the appellant, the outcome of the trial in the instant case depended essentially upon the evaluation by the jury of the credibility of the prosecutrix. For this reason the admission of the testimony of Dr. Anderson and his conclusions as to the absolute validity for evoking truthfulness of the sodium pentothal test and the admission of the recording itself clearly prejudiced appellant to a degree necessitating a new trial.

II. Instruction No. 8-A is erroneous because it is predicated on the admissibility of the sodium pentothal interview which is not a previous consistent statement and the instruction is inherently contradictory

Instruction No. 8-A (R. 461), previously set forth in part, was objected to on the ground that it was predicated upon the admissibility of the sodium pentothal test. If the admission of the opinion of the psychiatrist and the admission of the recording constitute error, it follows, of course, that the instruction constituted error. Having given numerous reasons why the admission of this disputed testimony constituted error, we will not repeat the arguments made under point I of this brief. However, appellant wishes to stress two additional points:

- (1) From the reading of Instruction No. 8-A it ap-

pears that the trial court thought it was following the few jurisdictions admitting previous consistent statements of an impeached witness. We have shown that a large majority of the courts, including the federal courts, reject this view. Even if this court were to follow the minority rule, it should be pointed out that the recording does not constitute a previous consistent statement. It is undisputed that the sodium pentothal test was given six weeks subsequent to the time the prosecutrix had given the retraction impeaching her.

(2) Instruction No. 8-A *inter alia* contains the following language:

“As to all this evidence you are instructed that *if you find that the four letters and the sworn statements are untrue*, or the statements in them were falsely made, you should disregard them. *But if you find to the contrary you will then determine whether she has been impeached*, and in this connection you are instructed that you may find that she has or has not been impeached.”

It is submitted that this portion of the instruction is inherently contradictory and must have been misleading to the jury. Clearly, if the jury found that the statements contained in the letters and the sworn statement were true, there can be no question that the witness was impeached.

It is appellant's position that in view of the errors committed in the giving of this instruction appellant is entitled to a new trial. Appellant reiterates that the cautionary portion of the instruction (R. 463), in our view, does not overcome the injurious effect the admission of the testimony must have had upon the jury. See

Dowdy v. U. S., 46 F.(2d) 417, 425. Even if the disputed evidence had only been used for purposes of corroboration, in the instant case its admission damaged appellant irreparably because the disputed evidence cut directly the jugular vein of the trial, *i.e.*, the credibility of the prosecutrix.

III. The testimony of the prosecutrix lacks sufficient corroboration and judgment of acquittal should have been entered

Appellant is convinced that the testimony of the prosecutrix lacked sufficient corroboration permitting the judgment of conviction to stand. While some state courts have held that a conviction of statutory rape may be sustained on the uncorroborated testimony of the prosecutrix, other states, including the federal courts, have insisted on the requirement of some corroboration. See exhaustive annotation on this subject in 60 A.L.R. 1124-2255, "Necessity and Sufficiency of Corroboration of Prosecuting Witness in Prosecutions for Rape." It is a matter of common knowledge and perhaps, since Lord Hale's aphorism, even a matter of judicial notice that accusations of rape are easily fabricated and very difficult to disprove. In the Statement of the Case, appellant has attempted to give the court a full picture of all of the material testimony adduced at the trial. The following factors impress the writers of this brief as being of utmost significance:

(1) The appellant, a man of forty years of age, has never been convicted of any offense.

(2) He has at all times completely protested his innocence.

(3) His testimony at the trial protesting his inno-

cense stands unimpeached except for the accusations of the prosecutrix.

(4) Although the acts alleged to have been committed by appellant on innumerable occasions during the period of five years preceding the trial at the home of the appellant while other adults, including the brother of the prosecutrix, who testified for the Government, were allegedly present, no real or direct, evidence was adduced incriminating appellant.

With reference to the prosecutrix, on the other hand, we find that her testimony was impeached time and time again by direct as well as by circumstantial evidence:

(1) It is undisputed that the first complaint is made by the prosecutrix six weeks subsequent to the last act of claimed intercourse with appellant.

(2) Admittedly, the prosecutrix at that time wanted to leave the home of her adoptive parents. Because of her delinquent behavior she was in danger of being sent to a correctional institution by appellant,

(3) Immediately upon making the accusation against her father, she called her previous adoptive mother in Seattle wanting to make arrangements to live with her.

(4) There is no independent evidence that defendant physically abused the prosecutrix and no satisfactory explanation is offered for the failure of the prosecutrix to have made complaint during the five-year period during which she claimed the outrages to have occurred.

(5) Although her brother is at all times a close confidant, when on one occasion he asked her about possible misconduct of the defendant, she expressly denied it (R. 118).

(6) Neither the incriminating cotton nor the rubber contraceptives were found although immediately after making the accusation a thorough search was made of appellant's home by several people, including the brother of the prosecutrix.

(7) That the failure on the part of the prosecutrix to have made complaint earlier cannot be blamed on bashfulness is clearly demonstrated by the fact that the prosecutrix first made the accusation to a stranger, and to a male at that, and then she immediately proceeded to let all the world know of the outrages allegedly perpetrated upon her.

(8) When she goes to the home of her grandmother immediately after having made the accusation against appellant to Don Riewold, the nature of the accusation takes on a completely different form (R. 184):

“Q. All right. And what did she repeat that day when she came to your home, as you recall?

A. She told Mom and I, that Rollie TRIED TO RAPE HER THREE TIMES, when she came into the house.

Q. She said that Rollie had *tried to rape her three times?*

A. Yes.”

(9) Again we find that when the prosecutrix subsequently again had a motive to leave a home, she likewise accuses a member of that home of having raped her. Admittedly, the accusations against the Federal Marshal were made of whole cloth and solely for the purpose of being able to return to appellant's home.

(10) Confronted with this fabrication by the Federal

Marshal, we find that at the same time the prosecutrix admits that the accusations previously made against appellant are likewise false. It should be noted that there is no possible inference in the record that while the witness was with the Federal Marshal she had any contact with appellant or his family or that she could have been subjected to any influence on appellant's part.

(11) Does it ring true that a girl whose feelings were outraged as hers must have been if the accusations were true would want to return to live at the home of the man who had perpetrated these alleged atrocities upon her? The fact of her return alone, it is submitted, speaks louder in favor of appellant's innocence than any accusation leveled by her against appellant.

(12) The prosecutrix made a complete retraction of her accusations under oath, being fully aware at the time of making the retraction of the penalties of perjury.

(13) In the retraction (Defendant's Exhibit B; R. 341-343) we find the following (R. 342):

"Q. Loretta—why did you and your brother run away?

A. *I kind of wanted to go to my step-mother's in Seattle and [376] I phoned her up and she didn't know what to do. I was kind of disappointed and I really don't know exactly why I said what I did about my father and that is the only reason I can think of that I did it.*

Q. You mean then that by saying what you did you thought you would be able to go to live with your step-mother?

A. Yes."

(R. 343) :

“Q. Did you realize, Loretta, when you testified to all these charges in the Commissioner’s Court at the preliminary hearing, that you were under oath to tell the truth?

A. *I knew I was under oath but that didn’t mean anything to me then. But when I was up in Wrangell, Jack (Krepps), the Marshal up in Wrangell, told me what it meant when you lie under oath. I believe he had an idea I had been lying. Last Sunday and Monday (August 22nd and 23rd) I told him I was lying. . . .”*

(R. 343) :

“Q. Did you name specific instances and dates at the hearing?

A. Yes, I did.

Q. Where were they supposed to have taken place?

A. At our home on Woodland Avenue, when Mrs. Lindsay was having children. They were the *only dates when I knew he was home as he is gone a lot of the time.*

Q. That is the reason you named those specific dates then, because you knew if the authorities checked they would find out that he was at home at those times?

A. Yes.”

(14) She claims the appellant advised her to give a false answer to explain the results of her medical examination showing her habituation to sexual intercourse. The defendant was supposed to have done that in the presence of his mother-in-law and his wife. They

both denied it. It must be noted that this whole matter arose entirely on the suggestion of the prosecutrix according to her own testimony (R. 45) :

“A. Well, a few days later, when I went up to the house to see the kids, he—*I asked him what should I do at this thing if they asked me because I told him the doctor’s examination shows that I have had intercourse with somebody*, and he said, “Well, just tell them that you stuck a banana or something up you.”

(15) Finally, numerous character witnesses attested to her bad reputation for truth and veracity.

When we look at the corroborating factors to be present, what do we find :

(1) Unquestionably, appellant had opportunity to commit the crimes on the dates stated in the indictment.

(2) The medical examination proved that the prosecutrix was used to sexual intercourse.

(3) The brother of the prosecutrix testified that he would hear the defendant enter the room of the prosecutrix on some occasions early in the morning.

(4) The brother of the prosecutrix would be sent out of the house on occasions when appellant would be alone with her. On the other hand, it was shown that the brother of the prosecutrix was a delinquent child who had spent some time in Boys’ Town and that upon specific inquiry on his part, the prosecutrix denied the commission of an immoral act on the part of the appellant.

(5) Two and one-half weeks prior to the time the accusations were made by the prosecutrix, the defend-

ant found rubber contraceptives in the possession of the brother of the prosecutrix.

In many cases it has been held that mere access or opportunity to commit the crime of rape is insufficient corroboration. See annotation in 60 A.L.R. 1124 entitled "Necessity and Sufficiency of Corroboration of Prosecuting Witness in Prosecutions for Rape," at page 1144. Many cases likewise have held that complaint and disclosure by prosecutrix does not constitute "other evidence" in corroboration of testimony of prosecutrix (60 A.L.R. 1148). Appellant is convinced that under the testimony disclosed in the instant case sufficient corroboration as required by the federal courts ever since the decision in the *Kidwell v. U.S.*, 38 Appeal Cases, Dist. of Columbia, 566, is entirely lacking. In that case the District Court of Appeals of the District Court of Columbia reasoned with persuasive force entirely applicable to the facts in the instant case, at page 570:

"It is difficult to conceive of a condition more embarrassing or prejudicial to the defendant than the one here presented. In a felony of this enormity, where a conviction will be sustained upon the unassailed testimony of a single witness, and that the injured party, and where the difficulty of making a defense is unusually great, it is the duty of the court to carefully safeguard the defendant at every stage of the proceeding, and secure to him a trial legal in all respects. . . ."

and, further, at page 573:

"The prosecutrix Steele testified that she had made her home with defendant and his wife, her uncle and aunt, since she was a small girl, and that

defendant had had sexual intercourse with her for the last three years, whenever an opportunity was afforded. We are aware that a conviction for this offense will be sustained upon the testimony of the injured party alone. But where the courts have so held, the circumstances surrounding the parties at the time were such as to point to the probable guilt of the accused, or, at least, corroborate indirectly the testimony of the prosecutrix. In this case defendant was convicted under this count upon the bald statement of the prosecutrix that the acts had extended continuously over a period of three years in the house of defendant, where his wife and family resided. In view of the respectable standing of defendant, as shown by the evidence, and the incorrigible character of the prosecutrix and her bad reputation for truth and veracity in the community where she resided and was known, we do not think the evidence in support of this charge rises to the required standard. *Although no objection was interposed upon the ground of the insufficiency of the evidence to support a verdict of guilty on this count, in a felony of this magnitude, when the evidence is totally inadequate to satisfy the demands of justice, the court should of its own motion, correct the error.*”

That the federal courts require corroboration in cases of this kind and that the *Kidwell* case, *supra*, is still a valid precedent can be seen from a reading of the decision in case of *Ewing v. U. S.*, 135 F.(2d) 633, at page 636:

“ . . . Lord Hale’s aphorism concerning these accusations still is valid and for that reason, as the *Kidwell* case declares, ‘it is the duty of the court to carefully safeguard the defendant at every stage of the proceeding, and secure to him a trial legal in

all respects.' Hence corroboration, in the sense that there must be circumstances in proof which tend to support the prosecutrix' story, is required, and for lack of it Kidwell's conviction for one offense was reversed."

Although appellant at the trial did not make a motion for a directed verdict, we urge this court to consider the whole record and contend earnestly that there was insufficient corroboration of the testimony of the prosecutrix and that for this reason the judgment of conviction should be reversed and the charges against appellant should be dismissed.

IV. The repeated attempts of the United States District Attorney to bring before the jury evidence of an independent collateral crime constitute plain and reversible error entitling appellant to a new trial

On three occasions during the trial there was brought before the jury evidence of an independent collateral crime. When the District Attorney examined the witness Florence Dalton on direct examination, the following occurred (R. 145):

"Q. Now, Mrs. Dalton, I want you to go back in your memory now and tell the jury and the Court *if you recall having any experience with the defendant?*

MR. ZIEGLER: Now, if the Court please, we object to that as absolutely immaterial and highly prejudicial to the defendant.

MR. MUNSON: Your Honor, I believe that this is admissible to show motive, pattern, intent—

THE COURT: But not until after there has been, not until—evidence of this kind is admissible only

on rebuttal after the defense has put in issue the matter of intent or disposition or system or anything of that kind.

MR. MUNSON: May I approach the bench, your Honor?

THE COURT: Yes.

Whereupon respective counsel and the court reporter approached the bench, out of the hearing of the jury, and the following occurred: . . . ”

Again on cross-examination of appellant the District Attorney referred to an alleged criminal relationship between the appellant and the witness Florence Dalton as follows (R. 370, 371):

“Q. (By MR. MUNSON): Mr. Lindsey, I want you to go back in your memory now to a time when your sister-in-law, Florence Dalton, was a baby sitter at your house.

A. I don’t remember her baby-sitting at my home. I don’t remember.

Q. I will ask you this way then. Could it be—I mean, you just don’t remember; this was quite a long time ago—could it be that when Florence was twelve or thirteen years old that she was a baby sitter in your home on a night that you and your wife and possibly Larry Pawsey were out in the evening?

A. How long ago was this supposed to have been now?

Q. Oh, quite a few years ago. Could it have happened?

A. Well, anything, I suppose, could have.

Q. Here is what I want to ask you.

THE COURT: Well, it makes no difference

whether he remembers it or not. You have a right to ask what question you want to ask whether he remembers somebody being present or not, so let's get on with the case.

Q. (By MR. MUNSON): *Now, that night when you came home did you or did you not get in bed with Florence Dalton?* [408]

MR. ZIEGLER: Now, if the Court please—

A. *I don't remember that.*

MR. ZIEGLER: Just a moment. *We object to that as absolutely immaterial.*

MR. MUNSON: Your Honor, it is being introduced under the pattern, intent, motive exception that—I mean, this is only an impeaching question, but the evidence which is sought to be elicited is perfectly admissible.

MR. ZIEGLER: It is collateral and would open up the whole thing for a trial on another claim that someone—

THE COURT: For instance, in the present state of the testimony I don't think that—it is just a question of credibility. There isn't any question of intent, *and I can't think of any issues in the case that would call for the admission of any evidence*, under any of the known exceptions to the hearsay rule or under the rule as to the admissibility of evidence, *of other offenses*. For instance, where there is a question of intent, a question of knowledge, a question of motive, a question of system, why, *evidence of other offenses* is admissible, but I just don't see any such situation as that in this case.

MR. GILMORE: Is that all, Mr. Munson?

MR. MUNSON: I am afraid to get into any discussion of this, *your Honor, in front of the jury* for fear that it may be prejudicial."

In view of the previous attempt of the District Attorney and the colloquy between court and counsel on the second occasion, there can be little doubt that the jury was aware of the fact that the prosecution claimed that the defendant had committed another sex crime against another person. It is submitted that notwithstanding the fact that the trial court sustained the objection of defense counsel, appellant was seriously prejudiced. This conclusion is fortified by the fact that as part of the recording (R. 395-396) while the prosecutrix was under the influence of sodium pentothal the following occurred (R. 395, 396):

“Q. Now, I think *last night you told me that he tried the same sort of thing with somebody else?*

MR. ZIEGLER (Interposing during the playing of the recording): Now, if the Court please, just a moment.

A. I couldn't be positively sure, *but, I mean, oh, yeah, on that one I could.*

(Playing of recording suspended.)

MR. ZIEGLER: Just a moment. That part of it the Court has ruled on.

THE COURT: That part of it is within the Court's ruling.”

Counsel for appellant are not sure whether the questions contained in the excerpt last quoted were asked by the District Attorney or by Dr. Anderson, but, of course, insofar as the effect upon the jury is concerned it makes no difference. The damage to appellant was done.

In the instant case the trial court to the great prejudice of appellant had permitted the prosecutrix to testify to numerous acts of sexual relations between the

parties not charged in the indictment without objection thereto having been interposed and without the trial court having advised the jury that such testimony of previous sexual misconduct of the appellant toward the prosecutrix could be considered only as corroborative evidence and not as evidence of the charges tried. In fact the trial court permitted testimony to be introduced of the conduct between appellant and the prosecutrix preceding by seven years the trial. In many jurisdictions the admission of such testimony of collateral crimes even between the same parties has been categorically rejected on the ground of undue prejudice against a defendant, unless issues of identity, intent, or the application of the *res gestae* doctrine made such testimony otherwise competent. The admission of such testimony of other crimes between the same parties or with other parties renders nugatory the presumption of innocence which is to be accorded to the defendant; it indicates that the defendant is a man of depraved character; and imposes the obligation upon him of having to meet issues at the trial, which he is not prepared to meet. See: Annotation 167 A.L.R. 565-628, "Admissibility in Prosecution for Sexual Offenses, of Evidence of Similar Offenses," particularly pp. 567-570. It cannot be disputed that a large majority of jurisdiction in statutory rape cases exclude the admission of such testimony of criminal conduct with other parties because of its prejudicial character. 167 A.L.R. 588-590.

Appellant is convinced that a reading of the record leaves no doubt that notwithstanding the trial court's correctly sustaining objections to the introduction of this testimony, the prosecution succeeded in impress-

ing the jury that appellant had committed similar crimes with another party. Thus there exists an additional reason why defendant should be awarded a new trial.

V. The trial court's comments concerning implied coercion and undue influence exercised by appellant upon the prosecutrix in the matter of the latter's retraction of her accusations constituted plain error

When appellant attorney sought to introduce into evidence the retraction of the prosecutrix (D's. Exh. B) the trial judge in presence of the jury commented as follows (R. 193):

“THE COURT: Well, of course, a good many of those objections are obviated by the fact that it bears her signature, but I am rather in doubt about its admissibility, due [210] to the fact that the girl was only at the time fourteen years of age and was *taken by her foster father to the office of an attorney, and it seems to me that the influence that the father exuded over her would be presumed.* I am just wondering whether it is admissible under the circumstances developed by this case.”

(R. 194):

“THE COURT: I am not saying that there was actual coercion or anything, but the circumstances were *such that it would imply coercion, the relationship of the father to a fourteen-year-old girl.*”

(R. 196):

“THE COURT: Well, it isn't the sworn character of it so much as it is her signature on it, and, of course, when you speak of her signature, *then we are confronted with the question of whether the*

circumstances were such that they constituted coercion or undue influence."

(R. 196-197) :

"THE COURT: It isn't so much — my ruling doesn't for a moment imply that there was any actual coercion or any psychological pressure or anything of the kind. My ruling involves the question of whether or not the circumstances and the relationship of these people *were not such as to imply undue influence and coercion without anything having been said*, but of course there is testimony here of the complaining witness that *answers were suggested to her by the defendant.*"

(R. 197) :

"THE COURT: Oh, that is not stating the situation here. The crucial thing here is the relationship between the parties and the *undue influence that one had within his power to exercise over the other.* That is the crucial question."

Clearly the retraction of the prosecutrix was the heart of appellant's case. We are not unmindful of the fact that a federal judge has the right to comment on the evidence. We are equally mindful, however, of the fact that the discretion given to a federal judge in commenting on the evidence is a judicial discretion, which must be exercised in a fair and impartial manner, and the comments must have some basis in fact. We do not believe that there exists a rule of law according to which the relationship between a father and a fourteen-year-old adopted daughter implies coercion without any evidence thereof existing. In the instant case the testimony of the prosecutrix herself as well as the surrounding circumstances negative entirely the existence of undue

influence or of coercion (R. 42, 43, 60, 61, 283, 341, 342). It is perhaps true that defense counsel should have objected to the comments of the trial judge, in spite of the adverse effect such attitude on his part might have had upon the jury. Nevertheless when we realize the position occupied by a federal judge, his dominating influence with a jury because of his position, it is submitted that these comments constitute plain error entitling defendant to a new trial.

On this point the situation confronting the court is closely analogous to that encountered in the case of *Williams v. U. S.*, 93 F.(2d) 685, where this court awarded a new trial to a defendant in a criminal cause on the ground that the trial court in examining and cross-examining numerous witnesses had virtually assumed the role of prosecutor. The appellee in that case stressed the fact that the defense attorney had not objected to examination by the trial judge and could therefore not urge the claimed error. This court squarely ruled (p. 690) :

“Be that as it may, counsel are not held to strict accountability for failure to object or except when the questions are asked *by the court*. . . .”

and we might add, when the comments are made by the court. In awarding the appellant a new trial this court quoted with approval the following language (p. 691) :

“ . . . The evidence taken as a whole, might be so conclusive of the defendant's guilt that an appellate court would not be justified in interfering with the judgment on this count alone. But in a case where there is substantial conflict in the evidence as to the essential points that were required to be submitted to the jury, the course of the judge in unnecessarily

assuming to perform the duties incumbent primarily upon others might make it the duty of an appellate court, on this ground alone, to grant a new trial."

It is submitted that the decision of the United States Supreme Court in the case of *Quercia v. U. S.*, 289 U.S. 466, 77 L.ed. 1321, 1325, is likewise in point. In that case a new trial was granted to a convicted defendant on the ground that the trial court had committed reversible error in commenting on the evidence in an instruction (trial court in effect had called the defendant a liar). The United States Supreme Court ruled (1325):

"This privilege of the judge to comment on the facts has its inherent limitation. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, *but he may not either distort it or add to it*. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, *and especially that it should not be one-sided;*' that '*deductions and theories not warranted by the evidence should be studiously avoided.*' "

VI. The trial court committed reversible error in striking the testimony of all character witnesses who testified to the bad reputation for truth and veracity of the prosecutrix

Counsel for the defendant called three character witnesses who testified to the bad reputation of the prosecutrix for truth and veracity (R. 351-369).

The witness, Johnson, testified (R. 330-361) that during 1949-1950 he had occasionally employed the prosecutrix as a baby sitter. He testified that he was familiar with her reputation at a date immediately prior to the time the charges were filed against appellant (R. 352); he stated that he would not believe her under oath (R. 352); that he and his wife had discussed her reputation with others and that it was bad (353); he named several people with whom he had discussed her reputation, and stated that he was unable to recall the names of others with whom he had discussed the matter (R. 354, 355) shortly before the trial.

The witness Tasuda testified that he had heard the reputation of the prosecutrix discussed by her father and by her brother and by several other people whose names he could not recall (R. 362). He stated that these discussions took place approximately a year and one-half previous to the filing of the charges in the instant case (R. 364).

The witness Robert Baer testified that he had personally known the prosecutrix during early 1954 (R. 365); that he had discussed her reputation with the witness Johnson (R. 366), with an uncle of the prose-

cutrix and that he had heard it discussed at the V.F.W. Club but could not remember by whom (R. 369).

Whatever weight was to be attributed to this testimony was of course a question to be determined by the jury under proper instructions. In view of the credibility of the prosecutrix being the key issue of this trial, appellant points out that the ruling of the trial court in striking all the character testimony was highly prejudicial to appellant and constitutes another ground why a new trial should be awarded to appellant.

VII. The trial court erred in restricting testimony of appellant concerning hostility between himself and the prosecutrix to thirty days preceding her accusing appellant, and not permitting any testimony to be introduced concerning hostility between the prosecutrix and her mother and excluding testimony of motive on the part of the prosecutrix in making the accusations against appellant

The trial court restricted testimony of hostility between appellant and the prosecutrix to thirty days immediately preceding her accusations against appellant (R. 246, 248, 249, 252, 253, 259, 261, 262). The court refused to permit the appellant or his wife to show hostility between the mother and the prosecutrix entirely (R. 299, 226, 227). The trial court likewise refused to permit appellant's wife to testify concerning possible motive of the prosecutrix in making the charges against appellant (R. 211, 216, 217). In view of the fact that the court had permitted the prosecution to introduce testimony of the relationship between appellant and the prosecutrix for a period of approximately seven years

and in view of the importance as a motive of hostility between the prosecutrix and her adoptive parents, it is difficult to understand the trial court's rulings. That the appellant was highly prejudiced thereby can scarcely be questioned.

CONCLUSION

It has been shown that the trial court erred in permitting the psychiatrist to give his opinion as to the credibility to be attached to testimony of the prosecutrix. It has been demonstrated that the admission into evidence of the sodium pentothal recording violated the hearsay rule, is contrary to all reported decisions, deprived the appellant of the right of cross-examination and violated his constitutional right to be confronted with the witnesses against him. It has been established that a sodium pentothal test lacks scientific validity and that its use is highly prejudicial. It has been made clear that instruction No. 8-A should not have been given.

We are convinced that upon a reading of the full record this court will agree that the story of the prosecutrix lacks the requisite corroboration. In addition the misconduct of the prosecutor in attempting on several occasions to show the commission of a collateral crime of the appellant, the prejudicial comments of the trial court with reference to coercion having been used by the appellant in obtaining the retraction of the prosecutrix and the erroneous rulings of the trial court in excluding testimony of hostility between the prosecutrix and appellant and his wife prevented appellant from having a fair trial.

Appellant prays that the judgment of conviction be reversed.

Respectfully submitted,

PHILIP W. SCHOEL,
Attorney for Appellant.

MAX R. NICOLAI,
Of Counsel.

APPENDIX "A"

Appendix "A" is a complete transcript of retraction of prosecutrix of accusations originally made by her against appellant (Deft.'s Exh. "B"; R. 341-347).

The following statements were made by Loretta Lindsey in response to questions put to her by Robert H. Ziegler, Sr., at 10:15 A.M. on August 25, 1954, in the offices of Ziegler, Ziegler & Cloudy, attorneys for Rollie Lindsey, defendant in the case of the *United States of America v. Rollie Lindsey*. Those present at said time and place were Loretta Lindsey, Rollie Lindsey, Robert H. Ziegler, Sr., and Ruth Francis, Secretary.

Q. Please state your full name and age.

A. Loretta Lindsey. I am 14 years old and in the 8th grade at school.

Q. Do you consider Mr. Lindsey your father?

A. Yes.

Q. *Why are you here this morning?*

A. *So that I can drop this charge against him which isn't true.*

Q. Are you here of your own free will?

A. Yes.

Q. This is purely voluntary then?

A. Yes. I went home this morning for the first time in months *and told my father that I was now prepared to tell the truth.*

Q. Has anyone threatened you or tried to force you to come here and do this?

A. No.

Q. When did you prefer charges against your father?

A. I don't know exactly, but it was about 5 months ago.

Q. What did you charge him with having done?

A. Well—according to what I told “them” he was charged with rape, sodomy and contributing to the delinquency of a minor.

Q. Did you testify to that at the preliminary hearing?

A. Yes, I did.

Q. Did anyone else you know appear to testify against him?

A. I don’t know. I said what I had to say and then I left. I signed the complaint.

Q. Who went with you?

A. Reverend Grissett brought me up there and Mr. Davidson.

Q. At the time this preliminary hearing took place, Loretta, were you living at the Lindsey home?

A. No, I wasn’t. I was in the hospital. I had run away from home.

Q. *Loretta — why did you and your brother run away?*

A. *I kind of wanted to go to my step-mother’s in Seattle* and I phoned her up and she didn’t know what to do. I was kind of disappointed and I really don’t know exactly why I said what I did about my father and that is the only reason I can think of that I did it.

Q. You mean then that by saying what you did you thought you would be able to go to live with your step-mother?

A. Yes.

Q. Then you made this whole thing up “out of whole cloth”?

A. Yes.

Q. You mean that this is nothing but a figment of your imagination?

A. Yes.

Q. Did you realize, Loretta, when you testified to all these charges in the Commissioner's Court at the preliminary hearing, that you were under oath to tell the truth?

A. *I knew I was under oath but that didn't mean anything to me then.* But when I was up in Wrangell, Jack (Krepps), the Marshal up in Wrangell, told me what it meant when you lie under oath. I believe he had an idea I had been lying. *Last Sunday and Monday (August 22nd and 23rd) I told him I was lying.* When we talked about it, he didn't want Mrs. Krepps to be there as she didn't know anything about this and he didn't want her to hear what I said as they were friends and I had stayed with them in Wrangell one time.

Q. Why are you making these statements now, Loretta?

A. I want to go back to my family and I don't want the little Lindsey kids to have their Dad taken away from them for something he didn't do.

Q. You realize you have done a pretty serious thing to Rollie?

A. Yes, I know.

Q. Did you name specific instances and dates at the hearing?

A. Yes, I did.

Q. Where were they supposed to have taken place?

A. At our home on Woodland Avenue, when Mrs. Lindsey was having children. They were the only dates when I knew he was home as he is gone a lot of the time.

Q. *That is the reason you named those specific dates then, because you knew if the authorities checked they would find out that he was at home at those times?*

A. Yes.

Q. You must have hated him pretty badly to have made such charges.

A. I thought I did, but I was wrong.

Q. What would you like me to do about this?

A. I would like to have those charges dropped. I believe the U.S. Attorney has already dropped the case as Mr. Krepps called him up and asked him to.

Q. You know I intend to send a copy of your statement to the District Attorney immediately, because if what you say now is true, and I presume it is, the charges you made previously are very serious and you have just about destroyed your Dad's reputation in the community?

A. Yes, I know.

Q. I am going to have you sign this statement, under oath, and it will in effect result in your stating, under oath, that you lied previously, under oath. Can you think of anything else you would like to tell me, Loretta?

A. No.

Q. Have you ever asked your Dad and Mother here if you could go and live with your step-mother in Seattle?

A. Yes, and they were willing, but my step-mother didn't want me at that time.

Q. Where did you get the idea to do this, Loretta?

A. I don't know. I read a lot of mystery stories, and I guess that is where I got the idea.

Q. You are familiar with the word "frame" then and that is what you thought you would do to your Dad?

A. Um humm.

Q. Who was the first person you went to with this story?

A. I don't know.

Q. You had the idea after you left the Lindsey home?

A. No, before I left.

Q. Where did you go when you left ?

A. To my grandmother's.

Q. And then you put the idea into effect?

A. Yes.

Q. *If you were already out of Rollie's home, why did you have to use this method?*

A. *It would have been pretty hard to go to the States—to get out of town.*

Q. When you finally decided to put the plan into operation, who did you go to see?

A. Well—the Don Riewalds knew. I told them I wouldn't be baby-sitting for them any more and he asked me why and I said my folks were kind of mean to me and he said I wasn't telling them all, and so I did and I don't know whether he believed me or not but he said to go see the City Magistrate and that is where I went.

Q. Then you lied to him—you lied to the Magistrate—you lied to the Marshal—and you lied to the U.S. Attorney?

A. Yes.

LORETTA LINDSEY

Subscribed and sworn to before me this 25th day of August, 1954, at Ketchikan, Alaska.

ROBERT H. ZIEGLER

Notary Public for Alaska

My commission expires: 3/10/57.

APPENDIX "B"

Appendix "B" is a complete transcript of the sodium pentothal interview of the prosecutrix which was played to the jury by means of a recording (R. 385-399).

Whereupon the tape recording was run off as follows, with questions by Doctor Anderson and answers by Loretta Lindsey:

Q. O.K., Loretta. Loretta, can you hear me?

A. Yes.

Q. Now, I want to ask you this. You have talked about Mr. Lindsey, haven't you?

A. Yes.

Q. Now, who is Mr. Lindsey?

A. My adopted father.

Q. O.K.

(Playing of tape recording suspended.) [424]

MR. MUNSON: Is that the interview at the beginning as you remember it?

DOCTOR ANDERSON: That is right.

THE COURT: I think you should put it on the table there in front of the jury and not have it so loud.

MR. MUNSON: I have only got a small lead.

THE COURT: Oh.

(Playing of tape recording resumed.)

Q. (By Doctor Anderson): And is he the husband of your aunt who adopted you; is that right?

A. (By Loretta Lindsey): Yes.

Q. Did Mr. Lindsey adopt you or did Mrs. Lindsey only adopt you?

A. They both.

Q. They both adopted you?

A. Yes.

Q. And he is your uncle by marriage before he adopted you?

A. Yes.

Q. That is right. Now, you have said some things about Mr. Lindsey that has caused some concern; is that right?

A. Yes.

Q. Now, what about that? You have said some things about him, *and then you have changed your story a little bit*; do you recall doing that?

A. Yes. [425]

Q. Now, did Mr. Lindsey have sexual intercourse with you?

A. Yes.

Q. Did he do it very often?

A. Whenever he was home.

Q. How old were you when he first started this kind of thing?

A. About nine, I guess.

Q. And did he actually have intercourse with you when you were nine?

A. No.

Q. What did he do then?

A. Well, he—he——

Q. When you were nine what did he do?

A. He called up my Mom and told me to bring something down to the boat to him, and——

Q. This is the first time now?

A. Yes.

Q. Yes; all right.

A. And then he sent my brother Bob away when I got there and he took the boat off and drifted it out into the bay.

Q. This was in Ketchikan?

A. Yes.

Q. And you were nine years old?

A. Yes.

Q. And when the boat was drifting in the bay what did he do?

A. Well, he told me to go downstairs, and so I did, and then [426] he came downstairs with some lard in his hand and he put that on his, oh. I guess you would call it, penis, and he put it on there; I don't know why; but he told me to lay down, so I did what he said to do, and then he got on top of me.

Q. Did you have your clothes on?

A. Part of them.

Q. Did he take them off, or did you?

A. No. He did.

Q. And when he got on top of you, what did he do?

A. He put his penis into my private part of my body, and it wouldn't go, and he kept on trying to force it to go, and I screamed.

Q. Did it hurt?

A. Yeah.

Q. Did he ever get it in?

A. Not when he first tried.

Q. Not that time?

A. No.

Q. How long—how much later was it that he first got his penis in?

A. Well, the first time he really got it in was when my mother went to the hospital.

Q. This is your adopted mother?

A. Yes. [427]

A. Yes.

Q. Yes. She went to the hospital?

A. Yes.

Q. For what?

A. To have a baby.

Q. Was that her first baby?

A. Yes, it was.

Q. What was the date of that? Do you remember the date?

A. October 22nd. He will be three this year, so it was about three years ago.

Q. Three years ago October 22nd. What year would that be then?

A. 1951, I guess.

Q. 1951. That was the first time he ever got in?

A. Yes.

Q. How old were you then?

A. I was twelve.

Q. You were twelve. Had you started having periods then?

A. Yes.

Q. Had you developed as a woman by that time?

A. I guess you would say that.

Q. You have told Mr. Munson about this first time before, have you?

A. Yes, I have.

Q. Now, he was able to get inside that time?

A. Yes.

Q. Did it hurt?

A. Yes, it did, very much.

Q. Did it make you bleed any?

A. No.

Q. Now, are you telling us exactly what happened?

A. Yes, I am.

Q. Now, why are you telling this?

A. Because I can't take any longer what he was doing to me and to help my sister so she won't have to go through the same thing I have gone through.

Q. Where is your sister?

A. She is home.

Q. Does she live with the Lindseys?

A. Yes.

Q. How old is your sister?

A. She will be two this coming November.

Q. Two?

A. Yes.

Q. Well, now you said a baby was born three years ago?

A. That was my little brother.

Q. Oh, that was you little brother?

A. Yes.

Q. Now, then, your sister is almost two?

A. Yes. [429]

Q. Now, is this your sister, your full-blood sister?

A. No. She is actually my cousin.

Q. She is actually your cousin?

A. Yes.

Q. And she is also your adoptive sister; is that correct?

A. Yes.

Q. Now, Loretta, why did you later change your story and tell your father, your adoptive father, that this wasn't so?

A. Well, he knew it was so, but I wanted to do that to help my Mom and the kids.

Q. What do you mean by that?

A. Well, they would have lost their Mom and Dad and things and so——

Q. Would they have lost their Mom?

A. Yes.

Q. How would they have lost their Mom?

A. By having Mr. Lindsey sent away.

Q. Would that be their Mom or their Pop?

A. And her husband and the kids' Dad.

Q. Oh, I see. You felt sorry for Mrs. Lindsey and the kids?

A. Yes.

Q. Well, didn't you go to a lawyer with Mr. Lindsey and swear that the story wasn't true?

A. Yes. [430]

Q. Now, why did you do that?

A. Because I, because I had to do it because——

Q. You had to?

A. Yes.

Q. What do you mean, you "had to"?

A. Well, because my Mom is actually my aunt, and I didn't want to hurt her or the kids.

Q. Oh, you didn't want to hurt her or the kids?

A. Yes.

Q. When you went to the lawyer, you went there with your foster father, didn't you?

A. Yes.

Q. With Mr. Lindsey?

A. Yes.

Q. When you went there, were you telling the truth or were you telling a lie?

A. I was lying.

Q. You were lying. And you said you were lying to protect them?

A. Yes.

Q. Now, then, later you talked to Mr. Munson again, didn't you?

A. Yes.

Q. And did you tell him the truth or a lie?

A. The truth. [431]

Q. The truth. Do you remember when you saw me in April of this year?

A. Yes.

Q. Do you remember when you came and talked to me?

A. Yes.

Q. Were you telling me the truth then?

A. Yes.

Q. Do you remember talking to Mr. Parsons a few days ago, this week?

A. Yes.

Q. And he gave you some tests and had you tell some stories?

A. Yes.

Q. Were you telling him the truth?

A. Yes.

Q. *Now, are you telling us the truth now?*

A. *Yes.*

Q. Now, then, the truth is what? *Is it the truth that Mr. Lindsey did all these things with you?*

A. Yes, it is.

Q. How many times can you remember actual dates? You mentioned October 22, 1951, didn't you?

A. Yes.

Q. What happened on October 22, 1951? Did he have intercourse with you on that date? Loretta? Loretta? Can you hear me? [432]

A. Yes.

Q. Are you sleepy?

A. Yes.

Q. Are you real sleepy?

A. Yes.

Q. Can you tell me what happened on October 22, 1951?

A. October 22nd?

Q. 1951.

A. That was when my little brother Randy was born.

Q. What did Mr. Lindsey do then?

A. He told me to stay home and do the wash for him in the afternoon because we had about a half a clothes full of dirty clothes.

Q. Was this on October 22, 1951?

A. Yes.

Q. Was this the time he took you on the boat?

A. No. It happened at the house.

Q. Oh, this happened at the house, the first time he succeeded with you?

A. Yes.

Q. You mean, the first time he got his penis into you?

A. Yes.

Q. He did that in the house?

A. Yes.

Q. The boat time was when you were nine years old?
[433]

A. Yes.

Q. Did he do anything in between those times, the first time on the boat and then this time on October 22, 1951; did he fool around with you at all in between?

A. Yes.

Q. Very many times?

A. A lot of times.

Q. And what did he do to you?

A. Well, he tried intercourse a lot more times in between.

Q. And didn't succeed?

A. Yes; and then he used his tongue and his fingers.

Q. On you?

A. Yes; and he stuck his penis in my mouth.

Q. Did he do that very many times?

A. Yes, he did.

Q. Then, can you remember any other exact dates when he had intercourse with you?

A. Besides the one I just gave you?

Q. Yes; besides this October 22, 1951, date. Any since then; and the dates since then you can remember?

A. Two other ones.

Q. What are those dates?

A. October 22, 1952, and February 27, 1953.

Q. How do you remember those dates?

A. Because my mother went to the hospital.

MR. MUNSON: Loretta, don't you mean February 27, 1954? Wasn't it this year? Do you remember that date?

A. Yes.

Q. (By DR. ANDERSON): February 27, 1954?

A. Yes.

Q. And what was the date of the second baby?

A. The date?

Q. The date it was born, the second baby?

A. February 27th.

MR. MUNSON: That is the third baby.

Q. (By DR. ANDERSON): Is that the third baby?

A. Yes.

Q. What about the second baby?

A. The second baby?

MR. MUNSON : Your sister.

Q. (By DOCTOR ANDERSON) : Your little sister ; what is that date ?

A. Well, she went to the hospital and had her, had my little sister Janice.

Q. What was the date for that ?

A. October 23, 1952.

Q. She had one in 1951, another one a year and a day later in 1952, and then a little over a year later the next one comes in 1954 ; is that right ?

A. A year and forty-five minutes. [435]

Q. A year and forty-five minutes ; just over the line ?

A. Yes.

Q. Well, now, that means every time your step-mother, not step-mother, but your foster mother, went to the hospital this foster father of yours had intercourse with you ?

A. Yes.

Q. Did he do it other times, too ?

A. Yes ; but I can't remember the specific dates.

Q. Oh, that is why. Well, now, how often did it happen ?

A. Specific dates, or not ?

Q. No. I mean, not specific dates, but just as you went along there living with him, how often did he have intercourse with you ?

A. Whenever he came home.

Q. Well, how often would that be ?

A. Oh, once every two weeks, or two times every two weeks.

Q. So he had it every week or every two weeks ? Can you hold still, Loretta ? Now, why did you decide to go back and tell the same story again, Loretta ? What is

the matter? Loretta? Are you awake? What is the trouble, Loretta?

A. I don't feel awake.

Q. You don't feel what?

A. I don't feel awake.

Q. You don't feel awake? Do you feel sleepy?

A. Yes. [436]

Q. Why are you crying?

A. Something is hurting.

Q. Where does it hurt?

A. I don't know.

(Pause—no recording audible.)

Q. You are not crying because of what you have told us, are you?

A. No.

Q. Where does it hurt?

A. It doesn't hurt any more.

Q. It doesn't hurt any more now?

A. No.

Q. That was the needle that was hurting; see; that needle I stuck in your arm. It has stopped hurting now?

A. Yes.

Q. Why did you decide to tell Mr. Munson the truth again?

A. Because Mr. Lindsey told me that he didn't know if he could control himself after I came home.

Q. You mean he tried to do it to you again?

A. Yes.

Q. Did you like that idea?

A. No.

Q. You didn't like it?

A. No.

Q. So you—is that the only reason you decided to tell the [437] truth again?

A. No.

Q. What other reasons?

A. He told me right in front of my Mom and my Gram, because the doctor said I had actual intercourse with someone, and he said to say that I just stuck a banana or something up me.

Q. Did you like that suggestion?

A. No. And I couldn't see how my Mom or my Gram could believe somebody would say that.

Q. *Now I think last night you told me that he tried the same sort of thing with somebody else?*

MR. ZIEGLER: (Interposing during the playing of the recording.) Now, if the court please, just a moment.

A. *I couldn't be positively sure, but, I mean, oh, yeah, on that one I could.*

(Playing of recording suspended.)

MR. ZIEGLER: Just a moment. That part of it the Court has ruled on.

THE COURT: That part of it is within the Court's ruling.

Whereupon the volume was turned down so the recording was inaudible; and thereafter the playing of the recording was resumed as follows:

Q. (By DOCTOR ANDERSON): Why didn't you tell about Mr. Lindsey [438] before you really did tell about him? Why didn't you tell earlier?

A. Because I didn't know who to go to or what to tell anybody because my cousin Faye said (volume again turned down so recording inaudible)—and nobody believed her.

Your cousin Faye—Faye who?

(Volume again turned down so recording inaudible.)

Q. Were you scared to tell?

A. Yes.

Q. Then what made you finally decide to tell?

A. Because he hit me a lot of times.

Q. Is that the only reason, because he hit you?

A. And because I just couldn't take it any more.

Q. Now, who was the first person you told?

A. The first person I told was Mr. and Mrs. Don Riewold.

MR. MUNSON: Are you sure it wasn't Arleen Field?

A. Well, I told her before then, but those were the grownups.

MR. MUNSON: Oh.

Q. (By DOCTOR ANDERSON): The first grownups?

A. Yes.

Q. Then did you tell other people too?

A. Yes, I told my brother Bob about it.

Q. Did you tell any policeman about it?

A. No. My brother did that.

Q. Your brother did that? [439]

A. Yes.

Q. And you told them because you were tired of the whole situation?

A. Yes.

Q. *Have you been telling us the truth all the time while we have been talking to you here?*

A. Yes.

Q. Are you still sleepy?

A. Yes.

Q. Oh, let me ask you this, Loretta. Did you enjoy these experiences with your uncle?

A. No.

Q. No. Now, I would like to ask you one thing else.

You told Mr. Munson that your uncle used to put his penis in your mouth and then have intercourse with you, and you told me that he would have intercourse with you and then after he lost his erection then he would put it in your mouth. Now, which way did it happen?

A. He did both, but he didn't put his penis in my mouth after he had intercourse with me as much as he did, as he put it in before.

Q. He did it more before than after?

A. Yes. He usually did that when he used the rubber.

Q. In addition to putting his penis in your mouth, did he ever put his mouth on your sexual organs? [440]

A. Yes, he did.

Q. Which did he do oftener?

A. His penis in my mouth.

Q. He did that more than putting his mouth on your sexual organs?

A. Yes.

Q. Did he use his tongue on your organs?

A. Yes, he did, and his finger once in a while.

Q. Did he seem to enjoy it?

A. I guess he did.

Q. Did you enjoy it?

A. Not very often.

Q. Usually not?

A. Yes.

Q. *Now, did he do something like this every time he had intercourse with you?*

A. *Yes, he did.*

Q. One or other of those things first?

A. Yes.

Q. And then intercourse?

A. Yes.

Q. And once in a while afterwards?

A. Yes.

Q. Did the fluid ever go into your mouth?

A. *It did that practically every time he put his penis in my [441] mouth.*

Q. Then after he had the fluid go in your mouth, then he would have intercourse with you?

A. No. I mean, when—after—I mean sometimes I would be menstruating, and he would put his penis in my mouth because I couldn't have intercourse with him.

Q. Oh.

A. And he would let it go then, and, even sometimes when I wasn't, he would, but, when he had intercourse, he would usually make me—he would put his penis in my mouth and make me lick it so he could put the rubber on it.

Q. Oh, he would do that first?

A. Yes.

Q. Did he always use a rubber?

A. Not always.

Q. Did he usually use a rubber?

A. I guess you would say that; yes.

Q. When he didn't use a rubber, what did you do?

A. *Well, he usually let that stuff go into me, and right afterwards I would go into the bathroom and wash out as best I could.*

Q. What did you use to wash out?

A. Oh, one of those—

Q. Did you have a syringe?

A. Yes; I guess you would call it that. [442]

Q. You would wash it out quick so you wouldn't get pregnant?

A. Yes.

Q. Were you afraid you might get pregnant?

A. Yes, I was.

Q. Did he ever say anything about the possibility that you would get pregnant?

A. No.

(Playing of the tape recording concluded, and Direct Examination of Doctor Anderson was continued by Mr. Munson as follows:)

APPENDIX C

Appendix C consists of selected excerpts from article in 62 Yale Law Journal 315 (1952-1953) "Drug Induced Revelation and Criminal Investigation."

p. 317 " * * * Referred to in the popular press as "truth-serum," the drug used is not a serum and, as will appear, people do not always tell the "truth" under its influence. * * *"

p. 318 " * * * * The results, though not definitive, indicated that "normal" individuals (i.e., persons who perform adequately in their various functions, have good defenses and no highly pathological characteristics) are less likely to confess. "Neurotics" are more likely to break down and, what is of equal importance, to substitute fantasy for truth. * * *"

p. 319 " * * * An analysis of confessions obtained during narcoanalysis found that fantasies and delusions which frequently could not be distinguished from reality significantly limited the credibility of the statements. * * *"

p. 319 "In summary, experimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie. Others are so suggestible they will describe, in response to suggestive questioning, behavior which never in fact occurred. * * *"

p. 325 " * * * Considering the present state of scientific knowledge, as developed in the medical section of this article, a transcript of the interview should definitely not be admissible in evidence. Only the most san-

guine of the clinical investigators, unaware of the psychological complexities of material produced under the influence of drugs, have automatically accepted this material as "truth." Furthermore, utterances made while under drugs are frequently thick, mumbling, and disconnected. Both judge and jury would be at a loss to evaluate the material. Here again, the courts invoke the hearsay rule and exclude. This is not only unnecessary but delusive. The unreliability of the results and the lack of expert interpretation are sufficient reasons for exclusion. * * *

p. 340 "Admittedly, the dividing line between truth and untruth is a shadowy one. It is debatable whether psychology and psychiatry have progressed to the point where they are able (with or without narcoanalysis) to establish the truth or falsity of testimony. * * *"

p. 342 "* * Generally, relaxation is facilitated, verbalization is less inhibited, and there is freer expression of fact—as well as of fancy and suggestion. In some cases correct information may be withheld or distorted and, in others, erroneous data elicited through suggestion. * * *"

p. 346 "I believe it should be stressed that sodium amytal is not a truth-eliciting device. There are offenders who are able to cover up guilt even under deepest narcosis. The depth of narcosis, however, is an important consideration.

"While psychological material obtained under medication is usually valid, it is still possible for individuals to fantasize. This is especially true of pathological types with poorly differentiated ego structure, where the line between reality and fantasy remains extremely thin. In such cases great care must be exercised to avoid mistaking an unconscious fantasy for real experiences."

No. 14,739

IN THE

United States Court of Appeals
For the Ninth Circuit

ROLLAND LINDSEY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

THEODORE E. MUNSON,

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FILED

SEP - 7 1955

PAUL P. O'BRIEN, CLERK

Subject Index

	Page
Jurisdictional statement	1
Statement of facts	2
Issues involved	8
Summary of argument	12
Argument I	16

The trial court did not err in permitting Dr. Anderson to predicate his expert opinion concerning the character and credibility of Loretta Lindsey in part upon the results of a sodium pentothal interview (a) because a sodium pentothal interview is a reliable auxiliary procedure in connection with a full clinical examination by a psychiatrist especially where the subject is immature; (b) because in a case involving statutory rape and sodomy with the consent of the child victim there should be such psychiatric corroboration of the complaining witness admissible in evidence as such in the interest of complete justice to both the accused and to society; and (c) because the jury was entitled to have this data presented to them in order to evaluate the weight, if any, to be accorded to the expert opinion concerning Loretta's credibility, sanity and sexual normality

16

Argument II	26
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The trial court did not err in admitting the statement of Loretta Lindsey made while under the influence of sodium pentothal, as a prior consistent statement given under circumstances which precluded or made highly improbable the operation of the motive to fabricate, when a prior inconsistent statement had been introduced and her credibility attacked by imputations that her story was a recent contrivance and the result of hostility toward the defendant and its admission was not an abuse of that discretion accorded the trial court in this area

26

- A. Since there is a split of authority on whether or not a prior inconsistent statement throws open the

	Page
door to prior consistent statements, and since the question has never been determined in this jurisdiction, the trial court was at liberty to select the rule that it considered most conducive to a fair and just trial	26
B. Even those courts, which hold that impeachment by a prior inconsistent statement is not in itself sufficient cause to allow the introduction of a prior consistent statement, recognize the well established exception that the prior consistent statement may be admitted when the witness sought to be impeached has been accused of hostility or of making a recent fabrication	26
C. Although the consistent statement was not technically "prior" to the inconsistent statement nor to the time of bringing the charges it was made under circumstances which afforded a safeguard long recognized in the admission of hearsay evidence, i.e., the destruction of utter lack of the li ability or motive to fabricate.....	27
D. The admission of the prior consistent statement to rehabilitate Loretta Lindsey after she had been impeached by charges that she was hostile to the defendant and a pathological liar was in the sound discretion of the trial court.....	27
Argument III	33
Alaska follows the common law rule that corroboration of the complaining witness in a rape case is not required, but even assuming such a requirement the government has introduced sufficient corroboration evidence to satisfy the standards of jurisdictions in which corroboration is required	33
Argument IV	38
In view of he defendant's admission that the "hostility" of the complaining witness was generated only by acts of parental discipline and was not of a continuing nature, it was not reversible error for the trial court in its sound discretion to limit the showing of hostility	

to a period of 30 days prior to the initiation of the charges 38

Argument V 39

The trial court did not commit reversible error in striking the bad character testimony when, as the record clearly shows, the character witnesses were not properly qualified to give testimony as to Loretta Lindsey's reputation in the community for truth and veracity... 39

Argument VI 43

It was not prejudicial misconduct on the part of the United States attorney to attempt to show a similar offense with another young girl as evidence of a common criminal design or lustful disposition, nor was it improper to seek to impeach the defendant by questioning him about this prior immoral act, where the trial court sustained defendant's objections and where the introduction of this evidence for either purpose is recognized in many jurisdictions 43

Argument VII 47

The trial court's comments at the time of reserving for later decision the question of the admissibility of the retraction statement, did not constitute reversible error when viewed in the light of the facts as then disclosed, and the court's clear explanation of its position; particularly when the retraction statement was later admitted in evidence as Defendant's Exhibit "B"..... 47

Argument VIII 50

The trial court did not err in excluding testimony of appellant that there was a feeling of hostility by Loretta Lindsey toward Victoria Lindsey, aunt by blood and adoptive mother of Loretta and wife of appellant, when there was no foundation laid for such impeachment and when the record clearly shows that no hostility did in fact exist..... 50

Conclusions 51

Table of Authorities Cited

Cases	Pages
Affronti v. United States, 145 U.S. ^{F.2d} 3 (8th Cir. 1944)	25, 33
Beaty v. United States, 203 F. 2d 652 (4th Cir. 1953)	33
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Boddie v. State, 52 Ala. 395 (1875)	34
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City of South Bend v. Turner, 71 N.E. 657 (Ind. 1904)	40
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Coulson v. United States, 51 F. 2d 178 (10th Cir. 1931)	45
Crump v. State, 257 P. 2d 1103 (Okla. Crim. 1953)	36
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Dowdy v. United States, 46 F. 2d 417 (4th Cir. 1931)	29
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v

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People v. McNichol, 224 P. 2d 21 (Cal.App. 1950).....	18
People v. Peters, 48 N.E. 2d 352 (Ill. 1943).....	36
People v. Root, 245 P. 2d 679 (Cal.App. 1952).....	40
People v. Singer, 89 N.E. 2d 710 (N.Y. 1949).....	28
People v. Stephens, 256 P. 2d 1033 (Cal.App. 1953).....	23
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Ray v. State, 57 So. 2d 469 (Miss. 1952).....	23
Shewitz v. United States, 293 F. 581 (6th Cir. 1923).....	40
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State v. Hudson, 289 S.W. 920 (Mo. 1926).....	18
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State v. Lindemuth, 243 P. 2d 325 (N.M. 1952)..... 16, 19, 21	
State v. Lowry, 185 P. 2d 147 (Kans. 1947)	21
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..... 18, 20, 21, 25	
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Alaska Compiled Laws Annotated (1949) :	
Section 65-1-3	54
Section 65-4-12	1
Section 65-9-10	1
Section 66-13-61	34, 54
28 U.S.C., Section 1291.....	2
48 U.S.C., Section 101.....	2

Rules

Federal Rules of Criminal Procedure (18 U.S.C.), Rule 30..	25
--	----

Texts

140 A.L.R. 21, 93-128.....	28
140 A.L.R. 49, 59	27
167 A.L.R. 565, 574	46
167 A.L.R. 565, 588	44
167 A.L.R. 565, 590	44
58 Am. Jur. 383, Section 707.....	38
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Section 49, page 108.....	27
Section 175, page 374.....	32
Section 175, pages 373-375	18
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Volume 2, Sections 398, 399, pages 355-368.....	46
Volume 2, Section 680	21
Volume 2, page 2265.....	18

	Pages
Volume 3, Section 466	18
Volume 3, Section 691, page 17.....	40
Volume 3, Section 924(a).....	18, 20, 34
Volume 3, Section 934(a)	18, 20
Volume 3, Section 950, page 504	39
Volume 3, Sections 977 et seq.	21
Volume 3, Sections 981, 982, pages 547-550.....	45
Volume 4, Section 1126, page 197.....	27
Volume 4, Section 1126, page 202.....	31
Volume 4, Section 1128, page 203.....	28
Volume 4, Section 1129, page 205.....	28
Volume 5, Section 1613, page 484.....	40
Volume 7, Section 2061, page 345.....	34
Volume 7, Section 2061, pages 354-5.....	34
Volume 8, Section 2265	23, 24

No. 14,739

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ROLLAND LINDSEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court for the District of Alaska, First Division at Ketchikan, the Honorable George W. Folta presiding, of three counts of statutory rape (§65-4-12 ACLA 1949) and three counts of sodomy (§65-9-10 ACLA 1949) committed upon his adopted daughter. The Court sentenced appellant to a term of 12 years on each rape count and to a term of 10 years on each sodomy count, all the terms to run concurrently. Appellant filed notice of appeal from the judgment of

the District Court, and was duly admitted to bail pending appeal to this Court.

Jurisdiction below was based on 48 U.S.C. §101, and in this Court on 28 U.S.C. §1291.

STATEMENT OF FACTS.

The complaining witness, Loretta Lindsey, in early April, 1954, went to the U. S. Marshal's office and reported that her adopted father had been having sexual intercourse with her and had committed sodomous acts upon her for several years. At the time this complaint was made Loretta was 14 years old. Her adoptive mother, Victoria Lindsey, wife of appellant, is her aunt by blood, each having as a common relative Mrs. R. D. Pawsey, mother of Victoria and paternal grandmother of Loretta. Loretta had already told Mrs. Pawsey that appellant had been sexually abusing her, and Mrs. Pawsey had taken Loretta to live with her (R. 45). Shortly after the complaint was made a preliminary hearing was held and appellant was held to answer to the Grand Jury of the District Court. The Territorial Welfare Department arranged to have Loretta go to Wrangell, Alaska, to stay with the family of the then Deputy U. S. Marshal John Krepps. She remained there until August when she was sent back to the Welfare authorities in Ketchikan by Deputy Marshal Krepps (R. 39-42). Loretta stated that she had become lonely for the three Lindsey children and for Mrs. Victoria Lindsey (R. 39), that she insinuated to Mrs. Judy Krepps that she was preg-

nant in such a way as to give Mrs. Krepps reason to infer that her husband had intercourse with Loretta (R. 41), that the reason she made such an insinuation to Mrs. Krepps was to induce them to send her back to Ketchikan (R. 41), which in fact they promptly did (R. 41-42). The insinuation against Mr. Krepps was devoid of any details and was recanted by Loretta before she left Wrangell (R. 41). After arriving in Ketchikan, Loretta the day following about 9 o'clock in the morning went to the Lindsey home (R. 222) assuming that they had received 3 letters from her written in Wrangell (Defendant's Exhibit A) in which she had informed them of her intention to "drop the charges" against appellant. Loretta was rather coolly received by appellant (R. 42) and his wife (R. 222) until she told them of her desire to return to the family fold and to "drop the charges" (R. 42, 222-3). Appellant immediately called his attorney (R. 224) and in 25 or 30 minutes (R. 223) Loretta and appellant were in the law offices of Ziegler, Ziegler and Cloudy having a statement prepared retracting the prior accusations against appellant (R. 280-281), (Defendant's Exhibit B). This was August 25, 1954. On October 11, 1954, the Grand Jury returned a true bill charging appellant with 3 counts of rape, 3 counts of sodomy, and 1 count of endeavoring to influence a witness in the District Court (R. 3-5). On October 6, 7 and 8, 1954, a complete clinical psychiatric examination was made on Loretta by Dr. Charles L. Anderson, M.D., a duly qualified psychiatrist who was assisted by a clinical psychologist and a psychiatric social worker (R. 148, 374-401). Dr. Ander-

son had examined Loretta on April 28, 1954, shortly after she had complained to the federal authorities (R. 375). Dr. Anderson was fully aware that Loretta had retracted her charges against appellant (R. 402) and also that she had insinuated that Mr. Krepps had had intercourse with her (R. 404). Dr. Anderson gave Loretta a complete clinical examination, including batteries of psychological tests and a sodium pentothal interview (R. 374-401). He stated that, in his opinion, a sodium pentothal interview would be highly reliable when properly used on an immature patient (R. 381) and considering the whole case (R. 377). Dr. Anderson testified that it was his purpose to break down her story if possible (R. 382) but while under the influence of sodium pentothal she told essentially the same story she told him on April 28, 1954 (R. 382). The sodium pentothal interview was voluntarily taken by Loretta (R. 382). The evening before the interview, Dr. Anderson went to Loretta's home and explained to her that he wanted to give her a "truth serum" test in order to ascertain the truth. He told her she would not be able to tell a lie under the influence of this drug (R. 382). A magnetic recording was made of the interview, which was offered in evidence in order to give the jury and the court an idea of the facts upon which the expert witness based his opinion as to Loretta's credibility and mental normalcy (R. 380, 383) and also to rehabilitate the impeached witness by showing a statement consistent with her testimony made at a time when her ability to fabricate was inhibited by the influence of the drug

(R. 383). The court admitted the offered evidence on these grounds (R. 383) after having ruled specifically that evidence of this kind was not substantive evidence but merely rehabilitation of a witness (R. 379) impeached as a liar and a mental incompetent (R. 380). Instruction 8-A carefully explains to the jury that the statements of Loretta made while she was under the influence of sodium pentothal could be considered only if the jury found that she had been impeached and then only to sustain, rehabilitate and corroborate the impeached witness if in fact the jury determined that the drug-induced statements were sufficient to rebut and overcome the effect of the impeachment (R. 461-463). After a full clinical examination of the complaining witness, Dr. Anderson concluded that, in his opinion as a psychiatrist, Loretta Lindsey was not a fabricator or a liar (R. 400) was not a psychopath (R. 409) or mentally deranged (R. 381, 400) but was, considering the circumstances of her life, a normal girl of 15 years (R. 400) who could not have gained the information she related to him concerning appellant's sexual misconduct with her without having personally experienced these acts (R. 401, 408). Dr. Anderson explained the use of the sodium pentothal interview and its high standing in the field of psychiatry (R. 377). He explained that it was only a part of the evidence he used and upon which he based his expert opinion (R. 378). In addition he had batteries of psychological tests conducted upon her (R. 400) in addition to his three personal examinations (R. 374-382, 400). On cross-examination,

Dr. Anderson testified that he had given several sodium pentothal interviews each year since 1941 to patients young and old (R. 403) that his purpose in giving the interview was objective (R. 404) that he used sodium pentothal because it was most satisfactory in maintaining the subject in twilight zone between consciousness and semi-consciousness (R. 407, 413). Defense counsel were fully aware at the trial that Dr. Anderson's expert opinion was based on observation of Loretta's conduct in court, the psychological tests, his discussions with her and the sodium pentothal interview (R. 410). On cross-examination, defense counsel confined their probing to the sodium pentothal interview (R. 412). Dr. Anderson also testified that knowing of Loretta's insinuation of rape against Mr. Krepps would have a bearing on his evaluation of Loretta but that it didn't alter his opinion (R. 413), presumably his opinion favorable to her character, credibility and normality. The defense on rebuttal put Dr. Clarke, a young general practitioner, on the stand to testify that the use of the sodium pentothal interview was not generally accepted in the medical profession, in his opinion based on literature in the medical field (R. 427), and that it was not reliable in ascertaining truth or falsity (R. 429). On cross-examination Dr. Clarke reluctantly admitted that he had never conducted a sodium pentothal interview (R. 436), and that he was not a qualified expert on the subject of sodium pentothal interviews or their psychiatric value (R. 437-8, 440). The defense then rested, and after argument of

counsel the court instructed the jury. In instruction 8, the court stated the law of impeachment and pointed out that the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value, and that the effect, if any, of the impeachment was for the jury to determine (R. 459). In instruction 8-A, the court explained rehabilitation of an impeached witness by statements made prior to the testimony on the stand consistent with that testimony and made at a time when the motive or ability to fabricate was reduced because of the influence of sodium pentothal (R. 461-2). The instruction points out that the jury first must decide whether the witness was impeached and then should consider whether she has been sustained or corroborated by the drug-induced statements (R. 462); and that the jury could believe the impeaching evidence or not, and could believe the rehabilitating evidence or not, only to determine the credibility of the witness and the weight, if any, to be accorded her testimony (R. 462-3). The trial court specifically cautioned the jury that the drug-induced statements of Loretta Lindsey were not substantive evidence that defendant committed any of the crimes charged (R. 463), and that these drug-induced statements would not have been admitted if Loretta had not been impeached as a witness (R. 463). On oral argument the Government in opening made a brief reference to the sodium pentothal interview as part of the examination made by Dr. Anderson upon which his expert opinion was based (R. 475-6). Defense counsel attacked the com-

plaining witness as a liar (R. 484, 496), cunning, deceitful and worldly-wise (R. 485), maladjusted (R. 490) and disoriented (R. 497). They argued the unreliability of the so-called truth-serum test (R. 487-8) and the unreliability of psychiatric testimony (R. 512-513). The closing argument of the Government emphasized that the sodium pentothal interview was not taken in a vacuum and that standing alone would not be overwhelmingly significant, but that the full psychiatric examination culminated in the psychiatrist's expert opinion that the complaining witness was mentally sound, was not a liar and could not have fabricated the testimony (R. 520). The jury returned a verdict of "guilty" on the 3 statutory rape counts and the 3 sodomy counts and a verdict of "not guilty" on the last count charging appellant with endeavoring to influence a witness.

ISSUES INVOLVED.

1. On Government rebuttal, is a recorded transcript of a sodium pentothal interview, conducted upon the complaining witness in a sex case by a qualified psychiatrist as part of a complete clinical examination, admissible to rebut testimony and inferences that the complaining witness is a pathological liar, a sex pervert and a mental case, where the recording was introduced for the purpose of presenting to the jury the facts relied upon by the expert witness in forming his opinion concerning the character, credibility, mental competency and sexual normalcy of the

impeached complaining witness in order to give the jury a sounder foundation for evaluating the opinion of the psychiatrist.

2. On Government rebuttal, is a recorded transcript of a sodium pentothal interview conducted as a part of a full clinical examination by a qualified psychiatrist admissible as a statement consistent with her testimony after her character has been attacked and her testimony impeached as a fabrication made as a result of hostility toward appellant, when the expert witness testified that such statements were made at a time when the ability of a young girl to fabricate was greatly inhibited by the influence of the drug, if not made impossible, and when the contents of the interview contained such a mass of complicated detail concerning intimate sexual matters that fabrication by such a young witness was highly improbable.

3. Under Alaska law, does the amount of corroboration of a rape complainant rest in sound discretion of the trial court, assuming arguendo that corroboration beyond proof of *corpus delicti* is required at all; and, if so, did the trial court abuse its discretion inasmuch as the facts adduced would satisfy the corroboration requirements of the great majority of jurisdictions in the United States where some corroboration of a rape complainant is required either by statute or by judicial decision; and where defendant-appellant did not object at the trial.

4. Does the record show prejudicial misconduct by the United States Attorney in attempting to show a prior act of sexual misconduct on the part of ap-

pellant on the Government's direct case as proof of design, pattern, motive and intent, and in cross-examination to impeach the appellant by questioning him about this specific immoral act, where the trial court sustained appellant's objections in its sound discretion even though there was authority for admission of such evidence in the discretion of the trial court; and when defendant-appellant made no objection at the trial.

5. Did the trial court commit reversible error in stating that he would reserve ruling on the admissibility of the complaining witness' retraction statement in view of the parental relation existing between appellant and the complaining witness, and in view of testimony indicating the possibility that there was, solely by reason of this relationship and circumstances surrounding the return of complaining witness to the family fold, a subtle, but implied, coercion of the complaining witness in making the retraction, when the trial court specifically and emphatically stated that there was no implication in his ruling of actual coercion; where the retraction statement was admitted in evidence as an Exhibit on appellant's direct case; where the complaining witness on her direct testimony and cross-examination freely admitted making the retraction of the charges against appellant, which by the prevailing practice would preclude appellant from again proving the inconsistent statement on his direct case by another witness, and when the trial court's statements and rulings were not objected to at the trial.

6. Did the trial court commit reversible error in striking the so-called bad character testimony introduced by appellant when the record clearly shows that none of the witnesses were qualified to give testimony concerning reputation of the complaining witness for truth and veracity, and when admission of character evidence lies in the sound discretion of the trial court, and especially when no objection was made at the trial.

7. Did the trial court commit reversible error in limiting testimony concerning hostility against appellant to a period of thirty days prior to the making of the charges involved in this case where the record clearly shows that appellant admitted that the hostility of the complaining witness derived from acts of parental discipline only and where appellant admitted that such hostility was not continual but rather short-lived and a natural child-like reaction to family discipline; and when defendant-appellant did not object to this ruling at the trial.

8. Did the trial court commit reversible error in sustaining the Government's objection to testimony of appellant to the effect that there was a feeling of hostility by the complaining witness toward Victoria Lindsey, aunt by blood and adoptive mother of the complaining witness and wife of appellant, when such testimony was objected to as irrelevant and immaterial, when the record shows that the complaining witness several times proclaimed great affection for Victoria, where Victoria had already testified on the stand and gave no indication of hostility between her and the

complaining witness, and especially where no objection was made to this ruling at the trial.

SUMMARY OF ARGUMENT.

I.

The trial court did not err in permitting Dr. Anderson to predicate his expert opinion concerning the character and credibility of Loretta Lindsey in part upon the results of a sodium pentothal interview (a) because a sodium pentothal interview is a reliable auxiliary procedure in connection with a full clinical examination by a psychiatrist especially where the subject is immature; (b) because in a case involving statutory rape and sodomy with the consent of the child victim there should be such psychiatric corroboration of the complaining witness admissible in evidence as such in the interest of complete justice to both the accused and to society; and (c) because the jury was entitled to have this data presented to them in order to evaluate the weight, if any, to be accorded to the expert opinion concerning Loretta's credibility, sanity and sexual normality.

II.

The trial court did not err in admitting the statement of Loretta Lindsey made while under the influence of sodium pentothal, as a prior consistent statement given under circumstances which precluded or made highly improbable the operation of the motive to fabricate, when a prior inconsistent statement had

been introduced and her credibility attacked by imputations that her story was a recent contrivance and the result of hostility toward the defendant, and its admission was not an abuse of that discretion accorded the trial court in this area.

A. Since there is a split of authority on whether or not a prior inconsistent statement throws open the door to prior consistent statements, and since the question has never been determined in this jurisdiction, the trial court was at liberty to select the rule that it considered most conducive to a fair and just trial.

B. Even those Courts, which hold that impeachment by a prior inconsistent statement is not in itself sufficient cause to allow the introduction of a prior consistent statement, recognize the well established exception that the prior consistent statement may be admitted when the witness sought to be impeached has been accused of hostility or of making a recent fabrication.

C. Although the consistent statement was not technically "prior" to the inconsistent statement nor to the time of bringing the charges it was made under circumstances which afforded a safeguard long recognized in the admission of hearsay evidence, i.e., the destruction of utter lack of the ability or motive to fabricate.

D. The admission of the prior consistent statement to rehabilitate Loretta Lindsey after she had been impeached by charges that she was hostile to

the defendant and a pathological liar was in the sound discretion of the trial court.

III.

Alaska follows the common-law rule that corroboration of the complaining witness in a rape case is not required, but even assuming such a requirement the Government has introduced sufficient corroboration evidence to satisfy the standards of jurisdictions in which corroboration is required.

IV.

In view of the defendant's admission that the "hostility" of the complaining witness was generated only by acts of parental discipline and was not of a continuing nature, it was not reversible error for the trial court in its sound discretion to limit the showing of hostility to a period of 30 days prior to the initiation of the charges.

V.

The trial court did not commit reversible error in striking the bad character testimony when, as the record clearly shows, the character witnesses were not properly qualified to give testimony as to Loretta Lindsey's reputation in the community for truth and veracity.

VI.

It was not prejudicial misconduct on the part of the United States attorney to attempt to show a similar offense with another young girl as evidence

of a common criminal design or lustful disposition, nor was it improper to seek to impeach the defendant by questioning him about this prior immoral act, where the trial court sustained defendant's objections and where the introduction of this evidence for either purpose is recognized in many jurisdictions.

VII.

The trial court's comments at the time of reserving for later decision the question of the admissibility of the retraction statement, did not constitute reversible error when viewed in the light of the facts as then disclosed, and the court's clear explanation of its position; particularly when the retraction statement was later admitted in evidence as Defendant's Exhibit "B".

VIII.

The trial court did not err in excluding testimony of appellant that there was a feeling of hostility by Loretta Lindsey toward Victoria Lindsey, aunt by blood and adoptive mother of Loretta and wife of appellant, when there was no foundation laid for such impeachment and when the record clearly shows that no hostility did in fact exist.

ARGUMENT I.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. ANDERSON TO PREDICATE HIS EXPERT OPINION CONCERNING THE CHARACTER AND CREDIBILITY OF LORETTA LINDSEY IN PART UPON THE RESULTS OF A SODIUM PENTOTHAL INTERVIEW (a) BECAUSE A SODIUM PENTOTHAL INTERVIEW IS A RELIABLE AUXILIARY PROCEDURE IN CONNECTION WITH A FULL CLINICAL EXAMINATION BY A PSYCHIATRIST ESPECIALLY WHERE THE SUBJECT IS IMMATURE; (b) BECAUSE IN A CASE INVOLVING STATUTORY RAPE AND SODOMY WITH THE CONSENT OF THE CHILD VICTIM THERE SHOULD BE SUCH PSYCHIATRIC CORROBORATION OF THE COMPLAINING WITNESS ADMISSIBLE IN EVIDENCE AS SUCH IN THE INTEREST OF COMPLETE JUSTICE TO BOTH THE ACCUSED AND TO SOCIETY; AND (c) BECAUSE THE JURY WAS ENTITLED TO HAVE THIS DATA PRESENTED TO THEM IN ORDER TO EVALUATE THE WEIGHT, IF ANY, TO BE ACCORDED TO THE EXPERT OPINION CONCERNING LORETTA'S CREDIBILITY, SANITY AND SEXUAL NORMALITY.

Appellant's main argument appears to be that the trial court erred in admitting Dr. Anderson's testimony concerning the results of a sodium pentothal interview conducted with Loretta Lindsey and in admitting a recorded transcript of statements made by Loretta while she was under the influence of the drug. At the trial, defendant objected to such admission on the ground of unreliability (R. 375), referring apparently to the opinion in *State v. Lindemuth*, 243 P. 2d 325 (N.M. 1952) (R. 379), and lack of precedent (R. 383). The trial court ruled that the evidence was admissible, not as substantive evidence (R. 379), but merely to sustain and corroborate the witness (R. 380, 384). The Government also urged admission of this evidence to rebut charges that Loretta Lindsey was a psychopathic liar and a mentally

deranged girl (R. 380); and that the recording was offered to give the jury and the Court an idea of the test that was used by Dr. Anderson as part of his clinical examination of Loretta in order to furnish a firmer foundation for evaluating the expert's opinion (R. 383). The trial court, in ruling in favor of admissibility, pointed out that the facts and circumstances of this case justified the Court in availing itself of scientific evidence (R. 383, 384). The expert confined his opinion to an evaluation of Loretta's character and credibility based upon a full clinical examination (R. 400-401). He gave no substantive evidence on the ultimate issues in the case viz., the guilt or innocence of appellant. He stated that, in his opinion, Loretta was not a fabricator or a liar, that she was not mentally deranged and that it was inconceivable to him that Loretta could have gained her intimate knowledge of sexual matters except from personal experience (R. 400-401). On cross-examination, he stated that it was his opinion that Loretta could not have fabricated such a complicated story dealing with sexual matters (R. 408), and that in his opinion Loretta was not a psychopath (R. 409).

The arguments urged by appellant (Appellant's Argument I) are not sound in principle and are not supported by his cited authorities. See Appendix "E", *infra*, for appellee's authorities on this point.

In support of the ruling of the trial court appellee has examined every pertinent authority which has considered the question of the admissibility of the results of narcoanalysis, here a sodium pentothal in-

interview. These authorities are analyzed by topical paragraphs in appellee's Appendix "D", *infra*. Since, so far as appellee knows, the precise issue posed by this appeal has not been authoritatively ruled upon in any jurisdiction, it is important to observe that the trend of the law is clearly in favor of the admissibility of psychiatric expert testimony, especially in sex cases, and in favor of presenting to the jury the data used by the psychiatrist in arriving at his expert opinion, including the results of narcoanalysis. *People v. Jones*, 266 P. 2d 38 (Sup. Ct. Cal. 1954); *People v. Ford*, 107 N.E. 2d 595 (N.Y. 1952) (dissent, no majority opinion); and see *U. S. v. Hiss*, 88 F. Sup. 559 (S.D.N.Y. 1950); *People v. Esposito*, 39 N.E. 2d 925 (N.Y. 1942); *People v. McNichol*, 224 P. 2d 21 (Cal. App. 1950); 3 Wigmore, *Evidence* (3d ed. 1940) §§ 466, 924(a), 934(a); 2 Wigmore, *id.*, 2265; C. T. McCormick, *Handbook of Law of Evidence*, West Pub. Co. (1954), § 45, p. 99, § 175, pp. 373-375 (Appendix "C", *infra*); *Psychiatric Aid in Evaluating the Credibility of Rape Complainant*, 26 Ind. L.J. 98 (1950) (Appendix "A", *infra*); Dession, Freedman, Donnelly and Redlich, *Drug-Induced Revelation*, 62 Yale L.J. 315, 320-1, 327-8, 338-342 (1953) (Appendix "B", *infra*).

The cases which have considered the admissibility of the results of narcoanalysis are not directly in point with the case at bar. For the most part, drug-induced statements have been offered in evidence by defendants in criminal cases as substantive evidence of their innocence. *State v. Hudson*, 289 S.W. 920

(Mo. 1926); *State v. Pusch*, 46 N.W. 2d 508 (N.D. 1950); *Orange v. Comm.*, 61 S.E. 2d 267 (Va. 1950); *State v. Lindemuth*, 243 P. 2d 325 (N.M. 1952); *U. S. v. Bouchier*, 5 U.S.C.M.A. 15, 17 C.M.R. 15, 20-24 (Ct. of Mil. App. 1954). In a recent case, *People v. Jones*, 266 P. 2d 38 (Sup. Ct. Cal. 1954), the Supreme Court of California ruled that it was reversible error to exclude testimony by a psychiatrist, based in part upon the result of a sodium pentothal interview, that in his opinion the defendant "was not a sexual deviate and was incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and one-half years of age". It is submitted that the *Jones* case goes much farther than the trial court did in the case at bar. The Supreme Court held the proffered evidence was admissible as tending to show the good character of defendant for morality. The Court distinguished *People v. Cullen*, 234 P. 2d 1 and *People v. McCracken*, 246 P. 2d 913, on the ground that in those cases the drug-induced statements of defendants were sought to be introduced for the purpose of proving the matter asserted whereas Jones' statements were merely data used by the psychiatrist in forming his opinion.

In sex cases, especially those in which the victim is a child who has consented to the sexual acts as in the *Jones* case and the case at bar, the Courts have shown a greater liberality in the admission of psychiatric testimony. In these consent-under-age sex cases it is always advisable to have the complaining witness undergo a full clinical psychiatric examina-

tion for the protection of the defendant as well as to vindicate a social and moral outrage. Indeed, Professor Wigmore says it is the imperative duty of the prosecutor to have the complainant thoroughly examined by a psychiatrist. 3 Wigmore, *Evidence* (3d ed. 1940) § 934 (a). The American Bar Association Committee on the Improvement of the Law of Evidence (1937-1938) by a vote of 47 to 2 recommended that in all sex cases the complainant should be examined physically and mentally. 3 Wigmore, *id.*, § 924(a). Professor McCormick urges such examinations as being justified by the present wide acceptance of psychiatric testimony, especially in sex cases. McCormick, *op. cit. supra* (1954), § 45, p. 99.

The record clearly shows that Loretta Lindsey was fully examined by Dr. Anderson (R. 374-385) and that she was given a battery of psychological tests (R. 378) in addition to the sodium pentothal interview. Dr. Anderson specifically testified that the sodium pentothal interview was not relied upon solely by him in forming his opinion of her character and credibility (R. 378, 400). Dr. Anderson testified that he watched Loretta closely during the four-day trial and that, in his opinion, her behavior and demeanor helped in forming his opinion of her (R. 380-381). He also stated that, in his opinion, the sodium pentothal interview is a more reliable auxiliary procedure when used with an immature subject (R. 381).

In *U. S. v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950), a psychiatrist was permitted to testify concerning his expert opinion of the character and credibility of a

witness he had only observed in the courtroom. The psychiatrist was permitted to state his opinion that the witness was a psychopathic personality and not worthy of belief. It is submitted that the *Hiss* case goes much farther in admitting psychiatric testimony than the trial court did in the instant case. Yet the *Hiss* case stands as good authority for doing what was done here. Appellee believes that a full clinical examination should be made of the witness to be impeached or rehabilitated, but perhaps the absence of such a firm foundation goes more to the weight than to the admissibility of such expert psychiatric testimony. 3 Wigmore, *Evidence* (3d ed. 1940) §§ 977 et seq., 2 Wigmore, *id.*, § 680.

The value of psychiatric testimony in sex cases involving young victims who have consented to the sexual acts cannot be denied. But appellant contends that the basis of the expert psychiatric opinion concerning character and credibility of an impeached complaining witness should not be admitted because sodium pentothal interviewing is an unreliable technique and no Appellate Court has approved the admission of such results. The *obiter dictum* in *State v. Lindemuth*, 243 P. 2d 325 (N.M. 1952) is certainly no authority for either argument. Other Courts apparently do not agree that narcoanalysis is unreliable because the results would have been admissible in evidence if the parties had so stipulated. *Orange v. Comm.*, 61 S.E. 2d 267 (Va. 1950); *People v. Houser*, 193 P. 2d 937 (Cal. App. 1948); *State v. Lowry*, 185 P. 2d 147 (Kans. 1947); *LeFevre v. State*, 8 N.W. 2d

288 (Wisc. 1943). In *Peo. v. Jones*, 266 P. 2d 38 (1954), the Supreme Court of California held the results of narcoanalysis admissible without stipulation.

Another basis for the admissibility of the drug-induced statements of Loretta Lindsey is well stated in the dissenting opinion of Judge Desmond in *People v. Ford*, 107 N.E. 2d 595 (N.Y. 1952). There was no majority opinion so it is impossible to know the precise basis for their decision. Judge Desmond's dissent, however, shows the careful research made of the question of admissibility of drug-induced statements as facts upon which the expert opinion of the psychiatrist is based. Since the opinion of the psychiatrist is acceptable and admissible in evidence it is essential that the jury should be informed of the facts upon which the expert based his conclusions in order to determine whether they are well founded [citing cases]. Judge Desmond carefully distinguished the lie detector cases as not being in point. Some of the Courts treat narcoanalysis and mechanical lie detection as though they were the same. Appellee contends that the question of admissibility of the results of mechanical lie detectors is not the same as the question of the admissibility of drug-induced statements made as part of a full clinical psychiatric examination.

It is submitted that the jury in the case at bar was entitled to know the demonstrable facts upon which Dr. Anderson's expert opinion concerning Loretta's character and credibility were based. *People v. Ford*,

107 N.E. 2d 925 (N.Y. 1942); and see authorities collected in Appendix "D" *infra*, para. 27.

So far as the argument that the magnetic recording of Loretta's drug-induced statements was inadmissible, appellee contends that the overwhelming weight of authority upholds the admissibility of properly identified magnetic recordings. *State v. Spencer*, 258 P. 2d 1147, 1152 (Sup. Ct. Ida. 1953); *People v. Stephens*, 256 P. 2d 1033 (Cal. App. 1953); *Ray v. State*, 57 So. 2d 469 (Miss. 1952); *State v. Perkins*, 198 S.W. 2d 704, 168 A.L.R. 920 (Mo. 1946); Anno. 168 A.L.R. 927; *Williams v. State*, 226 P. 2d 989, 994 (Okla. Crim. 1951); *Wright v. State*, 79 So. 2d 66 (Ala. 1955).

Appellee further contends that narcoanalysis is analogous to blood tests and medical examinations generally, the results of which are not offered for testimonial purposes. 8 Wigmore, *Evidence* (3d ed. 1940) § 2265. This alone is a sufficient reply to appellant's arguments that the admission of Loretta's drug-induced statements violated the hearsay rule and deprived appellant of his right to be confronted by the witnesses against him. Appellant's authorities are collected and analyzed in Appendix "E", *infra*. Appellee contends that none of appellant's authorities support his contentions because Loretta's drug-induced statements were not offered testimonially but only as clinical data used by the expert in arriving at his opinion of her character and credibility. The hearsay rule has no application to this situation.

People v. Jones, 266 P. 2d 38 (Cal. 1954); 8 Wigmore, *op. cit. supra*, § 2265. Moreover, appellant admits, as he has to, that nothing came in by way of Loretta's drug-induced statements that had not already been brought out on appellant and appellee's cases in chief. Indeed, considering the drug-induced statements as being consistent with and prior to her direct testimony it can hardly be denied that in order to sustain and rehabilitate an impeached witness it is logically necessary that there be no important discrepancies. Appellant's authorities in support of his inadmissible hearsay and deprivation of right of confrontation arguments do not support either argument. *Curtis v. Rives*, 123 F. 2d 936 (D.C. Cir. 1941); and *U. S. v. Douglas*, 155 F. 2d 894 (7th Cir. 1946). See Appendix "E", *infra*. It requires no citation of authorities to uphold the well-accepted rule that introduction of prior inconsistent statements to impeach and of prior consistent statements to rehabilitate does not result in a deprivation of the right of a defendant to be confronted with adverse witnesses and that the hearsay rule has no application because neither type of statement is offered testimonially to prove the truth of the facts asserted.

Appellant's assertion of error in Instruction 8-A is based upon the objection below that it was predicated upon inadmissible evidence, viz. the results of a sodium pentothal interview. On appeal, appellant now urges that the magnetic recording did not constitute a previous consistent statement and that instruction 8-A misled the jury on the matter of im-

peachment. Appellee strongly contends that it is patently unfair to a trial judge to rely upon an objection at the trial and then assert entirely different grounds for error on an appeal. Rule 30, F.R.Cr.P., clearly is intended to protect a trial judge from such unfairness. Appellee contends that Rule 30 precludes appellant from relying on anything except the inadmissible evidence objection.

Moreover, appellee contends that instruction 8-A correctly states the law of impeachment, and that the jury was not therefore misled.

Instruction 8-A is a good and proper instruction, and by the practice prevailing in the Federal Courts under the Rules of Criminal Procedure, 18 U.S.C., Courts of Appeal no longer take a strained and hypercritical view in passing on alleged error in instructions. *Patterson v. U. S.*, 192 F. 2d 631 (5th Cir. 1951), *cert. den.* 343 U.S. 951.

Appellee contends that the interests of complete justice will be best promoted and satisfied by giving the trial court a a wide area of discretion in the conduct of the trial and the admission of evidence. In the areas of psychiatric testimony, character evidence and evidence of prior inconsistent and prior consistent statements, the trend is definitely toward greater liberality in their admission. *U. S. v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950); *People v. Jones*, 266 P. 2d 38 (Cal. 1954); *Michelson v. U. S.*, 335 U.S. 469 (1948); *Di Carlo v. U. S.*, 6 F. 2d 364 (2d Cir. 1925); *Affronti v. U. S.*, 145 F. 2d 3 (8th Cir. 1944).

As Judge Hand recently emphasized in *U. S. v. Petrone*, 185 F. 2d 334 (2d Cir. 1950), it is (p. 336):

. . . the inveterate habit in American courts of treating rules of evidence as though they were sacred tables, that it is apparently impossible to substitute the view that they should be lightly held as wise admonitions for the general conduct of the trial.

The trial court's ruling in favor of admissibility was wise, under the circumstances of this case, and was in accordance with enlightened justice. There was no abuse of discretion and appellee respectfully submits that the ruling below should be affirmed.

ARGUMENT II.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENT OF LORETTA LINDSEY MADE WHILE UNDER THE INFLUENCE OF SODIUM PENTOTHAL, AS A PRIOR CONSISTENT STATEMENT GIVEN UNDER CIRCUMSTANCES WHICH PRECLUDED OR MADE HIGHLY IMPROBABLE THE OPERATION OF THE MOTIVE TO FABRICATE, WHEN A PRIOR INCONSISTENT STATEMENT HAD BEEN INTRODUCED AND HER CREDIBILITY ATTACKED BY IMPUTATIONS THAT HER STORY WAS A RECENT CONTRIVANCE AND THE RESULT OF HOSTILITY TOWARD THE DEFENDANT AND ITS ADMISSION WAS NOT AN ABUSE OF THAT DISCRETION ACCORDED THE TRIAL COURT IN THIS AREA.

- A. SINCE THERE IS A SPLIT OF AUTHORITY ON WHETHER OR NOT A PRIOR INCONSISTENT STATEMENT THROWS OPEN THE DOOR TO PRIOR CONSISTENT STATEMENTS, AND SINCE THE QUESTION HAS NEVER BEEN DETERMINED IN THIS JURISDICTION, THE TRIAL COURT WAS AT LIBERTY TO SELECT THE RULE THAT IT CONSIDERED MOST CONDUCTIVE TO A FAIR AND JUST TRIAL.
- B. EVEN THOSE COURTS, WHICH HOLD THAT IMPEACHMENT BY A PRIOR INCONSISTENT STATEMENT IS NOT

IN ITSELF SUFFICIENT CAUSE TO ALLOW THE INTRODUCTION OF A PRIOR CONSISTENT STATEMENT, RECOGNIZE THE WELL ESTABLISHED EXCEPTION THAT THE PRIOR CONSISTENT STATEMENT MAY BE ADMITTED WHEN THE WITNESS SOUGHT TO BE IMPEACHED HAS BEEN ACCUSED OF HOSTILITY OR OF MAKING A RECENT FABRICATION.

- C. ALTHOUGH THE CONSISTENT STATEMENT WAS NOT TECHNICALLY "PRIOR" TO THE INCONSISTENT STATEMENT NOR TO THE TIME OF BRINGING THE CHARGES IT WAS MADE UNDER CIRCUMSTANCES WHICH AFFORDED A SAFEGUARD LONG RECOGNIZED IN THE ADMISSION OF HEARSAY EVIDENCE, i.e., THE DESTRUCTION OF UTTER LACK OF THE ~~ABILITY~~ ABILITY OR MOTIVE TO FABRICATE.
- D. THE ADMISSION OF THE PRIOR CONSISTENT STATEMENT TO REHABILITATE LORETTA LINDSEY AFTER SHE HAD BEEN IMPEACHED BY CHARGES THAT SHE WAS HOSTILE TO THE DEFENDANT AND A PATHOLOGICAL LIAR WAS IN THE SOUND DISCRETION OF THE TRIAL COURT.

Diligent search has revealed no Alaskan cases treating the question of the admissibility of prior consistent statements. Other jurisdictions have ruled both ways on whether the mere introduction of a prior inconsistent statement permits the admission of a prior consistent case to rehabilitate the impeached witness. McCormick, *Evidence* 108, § 49:

There is much division of opinion on the question whether impeachment by inconsistent statement opens the door to support by proving consistent statements.

Discussed in 140 A.L.R. 49, 59 and 4 Wigmore, *Evidence*, (3d ed.) p. 197, § 1126.

Conceding that the majority view favors inadmissibility still the question was unsettled in Alaska and

the trial judge was free to select the rule which he considered most consonant with requirements of a fair and just trial.

But even those Courts following the majority view, holding that a prior inconsistent statement standing alone is not enough, will admit a prior consistent statement where the witness sought to be impeached has been charged with hostility or making a recent fabrication. (4 Wigmore, *Evidence*, (3d ed.) 203, § 1128 and 4 Wigmore, *id.*, 205, § 1129; *People v. Singer*, 89 N.E. 2d 710, (N.Y. 1949); 140 A.L.R. 21, 93-128. The federal Courts also recognize these well established exceptions to the rule that a prior consistent statement is inadmissible. *Di Carlo v. United States*, 6 F. 2d 364, 366 (2d Cir. 1925), *Cert. den.*, 268 U.S. 206:

It is well settled that, when the veracity of a witness is subject to challenge because of a motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross-examined. . . .

His declarations, of which the identifications in the police station were only a part were therefore admissible under the established rule, if made under circumstances which precluded or made improbable the operation of the motive through which his testimony might be impeached.

In *Dowdy v. United States*, 46 F. 2d 417 (4th Cir. 1931), cited by appellant, the decision was reversed not because a prior consistent statement had been introduced, but because a motive to fabricate existed at the time of making the prior consistent statement. The Circuit Court then went on to lay down the requirements for the admission of prior consistent statements (p. 424):

But in order to bring the case within the rule, it must appear that the conversation occurred soon after the transaction, is consistent with the statements made under oath, was made before any motive to fabricate could exist, and contains such fact or facts pertinent to the issues involved as reasonably furnish to the jury some test of the witness' integrity and accuracy of recollection; and such evidence should never be admitted until the witness has been in some way impeached; and the jury should be carefully cautioned that the evidence is to be considered only as affecting the credibility of the witness; and it should never be admitted as substantive or independent supporting testimony.

The case of *United States v. Sherman*, 171 F. 2d 619 (2d Cir. 1948), is also cited by appellant in support of the proposition that the federal Courts follow an inflexible rule rejecting all prior consistent statements used to rehabilitate an impeached witness. Although Judge Hand's language in that case is somewhat ambiguous, a close inspection of the case will show that the statement was excluded because the witness had a motive to fabricate when it was made and the *Di*

Carlo case was cited in support of its inadmissibility. The significant language is found on page 622:

Concededly the second statement was not competent unless the admission of the impeaching statement made it so, for when Oliva made it he had the same motive to fabricate—the hope of lenity—that he had while on the stand. [Citing the *Di Carlo* case.] (*Di Carlo v. U. S.*, *supra*.)

All the Court is saying here is that Oliva's consistent statement is inadmissible because made when he had a motive to fabricate, and the fact that an inconsistent statement was shown did not make inadmissible evidence, admissible. Obviously no departure from the *Di Carlo* case was intended because it was cited in support of the Court's position. The dictum relied upon by appellant found on page 622, "The reason for its exclusion is because it has not been made on oath rather than because it had no probative value", refers only to the basic rule holding consistent statements inadmissible and was not meant to include the exceptions to this rule based on hostility and recent fabrication. To accept this dictum blindly would be to wipe out all the recognized hearsay exceptions and that was certainly not Judge Hand's intent.

Thus, it is well recognized by the authorities, and the federal cases are in accord, that where evidence has been introduced to show a witness' hostility or where either expressly or by implication her story is assailed as a recent fabrication a prior consistent statement may be admitted.

In the present case the entire defense was posited upon the ground that because of Loretta's hostility toward her father she made up this saga of carnal abuse (R. 87, 92, 94, 247-268). Defense counsel also implied that her testimony concerning the sodomous acts was a recent contrivance (R. 85).

Since the defense had sought to impeach Loretta Lindsey with a prior inconsistent statement, with evidence of her hostility toward defendant, and by implications that part of her story was a recent fabrication, the Government was then at liberty to introduce a prior consistent statement to rehabilitate her.

The sequence of events leading up to the trial was as follows: the charges were made, a preliminary hearing was held, the retraction statement was made, the consistent statement was made under sodium pentothal, and finally the trial. What is meant by the term "prior" is that the statement be made prior to the time when the witness possessed a motive to fabricate. It is not necessary that the consistent statement antedate the inconsistent statement. Wigmore, *Evidence*, 202 § 1126:

. . . It is sometimes said, by Courts admitting consistent statements, that they must have been uttered before the self-contradiction; though this seems an unnecessary refinement.

What is important is the lack or absence of a motive to fabricate. It is submitted that the story elicited under sodium pentothal satisfies this safeguard. The

interview was the culmination of a battery of psychological tests given to determine the veracity of the prosecutrix's story. A properly qualified expert testified that on the basis of the tests he had given, and considering the girl's age and personality make-up, he was convinced she was telling the truth when under the influence of sodium pentothal (R. 402). It is the opinion of the appellee that a statement obtained under these conditions and as part of a series of psychological tests, is the most reliable type of consistent statement possible to obtain. A noted authority on evidence concurs in this view. McCormick, *Evidence*, 374 § 175:

. . . If, however, a foundation should be laid by evidence of experts as to the validity of the method and as to its correct application in the particular instance so that in the opinion of the experts the power of conscious contriving was removed and the statements were not actuated by fantasy or suggestion—ever present dangers here—such statements under voluntary narcosis could reasonably be admitted. Even when offered by the party on his own behalf, the “hearsay” or “self-serving” objection need not prevail. *If the offering party has testified, the statement may be offered, not to prove the facts stated therein, but as a prior consistent statement to support his credibility*, escaping the rule against such form of support by reason of the foundation showing the unique trustworthiness of this type of prior statement. (Emphasis supplied.)

Finally the admission of a prior consistent statement to rehabilitate an impeached witness is in the

sound discretion of the Court, and should not warrant a reversal except on a showing of clear abuse. In *Beaty v. U. S.*, 203 F. 2d 652, 656, (4th Cir. 1953) the Court after holding that the prior consistent statement was properly admitted went on to say:

. . . To what extent they should be admitted for purposes of corroboration is a matter resting largely in the discretion of the trial judge and we do not think that the admission of the evidence here constituted an abuse of discretion or furnishes any ground for awarding a new trial.

To the same effect see *Affronti v. U. S.*, 145 U.S. 3, 8 (8th Cir. 1944).

In view of careful psychological testing leading up to the sodium pentothal interview, and the expert's testimony to its efficacy on this particular witness, it was not an abuse of the trial court's discretion in this area to admit the recording of the sodium pentothal interview.

ARGUMENT III.

ALASKA FOLLOWS THE COMMON-LAW RULE THAT CORROBORATION OF THE COMPLAINING WITNESS IN A RAPE CASE IS NOT REQUIRED, BUT EVEN ASSUMING SUCH A REQUIREMENT THE GOVERNMENT HAS INTRODUCED SUFFICIENT CORROBORATION EVIDENCE TO SATISFY THE STANDARDS OF JURISDICTIONS IN WHICH CORROBORATION IS REQUIRED.

Although appellant did not raise this objection at the trial and did not request a judgment of acquittal or a new trial, he now asserts that the testimony of Loretta lacks sufficient corroboration to uphold the

conviction on appeal (Appellant's Argument III). This afterthought is called "plain error" by appellant (Appellant's Brief, p. 12).

The rule at common law is that "the testimony of the prosecutrix or injured person, in the trial of all offenses against the chastity of women, was alone sufficient evidence to support a conviction, neither a second witness nor corroborating circumstances were necessary". 7 Wigmore, *Evidence* (3d ed. 1940) § 2061. The jury is entitled to believe her testimony, and convict; or disbelieve her, and acquit; and if a conviction is had, appellant will not be heard to complain that the testimony of prosecutrix was not corroborated. *Boddie v. State*, 52 Ala. 395 (1875) stated in 7 Wigmore, *id.*, p. 345.

Alaska has no statute changing this common law rule. § 66-13-61 A.C.L.A. 1949 requires corroboration only in cases of abduction of a female for prostitution or seduction under promise of marriage. There is no reported decision, to the knowledge of appellee, requiring corroboration of a rape-complainant in Alaska. It is submitted that such a requirement is grossly unfair in consent-under-age sex cases and would do more to pervert justice than to promote it. 7 Wigmore, *id.*, § 2061 pp. 354-5. The better procedure is to resort to scientific analysis of the prosecutrix's mentality in order to determine credibility, rather than rely upon a statutory rule of thumb. *Id.*, pp. 354-5; 3 *id.*, § 924(a); *Psychiatric Aid in Evaluating the Credibility of Rape Complainant*, 26 Ind. L.J. 98 (1950) set out in Appendix "A", *infra*.

An example of the injustice of the statutory corroboration rule is *State v. Elsen*, 187 P. 2d 976 (Ida. 1947) in which defendant, a 59 year old man, was convicted below of statutory rape of a 12 year old girl. The girl admitted consent to sexual intercourse with persons other than defendant. The Appellate Court held that she had impeached herself and since there was no other direct evidence of the crime, the conviction was reversed. The case shows that there was in fact sufficient evidence to support the conviction, although appellee agrees that the prosecution would have been strengthened if prosecutrix had been sustained by psychiatric testimony of her credibility following a full clinical examination.

Appellant cites *Kidwell v. U. S.*, 38 App. D.C. 566 (1912) and *Ewing v. U. S.*, 135 F. 2d 633 (1942), *cert. den.* 318 U.S. 776, *reh. den.* 318 U.S. 803 (1942) as stating the "federal rule", apparently unmindful of the fact that the Federal Courts in the District of Columbia are similar to those in Alaska in administering local law. But even the "District of Columbia" rule appears to be set out in the *Ewing* case as follows (p. 635):

. . . corroboration, in the sense that there must be circumstances in proof which tend to support the prosecutrix' story, is required, and for the lack of it Kidwell's conviction for one offense was reversed.

But to safeguard the defendant by requiring corroboration in this sense is one thing. To throw around him a wall of immunity requiring the testimony of an eye-witness or "direct evi-

dence" which is more than circumstantial, in support of the prosecutrix' story, is another . . .

The *Ewing* case and many other decisions which use the term "corroboration" apparently refer to nothing more than proof of the corpus delicti. It is submitted that, with the exception of the State of Idaho, a clear and convincing story by the rape complainant accompanied by circumstances which tend to support her testimony is sufficient to go to the jury and is sufficient to sustain a conviction on appeal. *State v. Davis*, 147 P. 2d 940 (Wash. 1944); *Peo. v. Crawford*, 141 Pac. 824 (Cal. App. 1914); *State v. Shults*, 85 P. 2d 591 (N.M. 1938); *Woolridge v. State*, 236 P. 2d 196 (Okla. Crim. 1953); *Crumpp v. State*, 257 P. 2d 1103 (Okla. Crim. 1953). The case of *People v. Burns*, 4 N.E. 2d 26 (Ill. 1936) is strikingly parallel to the case at bar. The prosecutrix, a 14 year old girl, testified that she had been having sexual intercourse with her uncle for 3 months. The rape charged in the indictment was based upon the uncorroborated testimony of prosecutrix, except to the extent that her brother testified he saw defendant and prosecutrix in defendant's car on the day specified. On appeal, held that prosecutrix' testimony was reasonable, fair and probable, and was abundantly corroborated by the facts and circumstances surrounding the case. The Court cited *People v. Peters*, 48 N.E. 2d 352 (Ill. 1943) in which case the same Court stated that it is well settled that the testimony of a prosecutrix uncorroborated by other wit-

nesses may be sufficient to justify a conviction if clear and convincing.

Appellee submits that the trial court is in the proper position to rule on proof of the corpus delicti, if "corroboration" means that. Of course, the trial court in this case was not presented with the corroboration issue because appellant did not move for a judgment of acquittal or for a new trial.

Appellee further submits that the question of persuasiveness of the prosecutrix ought to be exclusively for the jury.

Without going into a detailed rebuttal of the "facts" stated in appellant's brief (Argument III, pp. 36-44), appellee submits that the record does not support the brief on the facts.

Loretta Lindsey's testimony was clear and convincing, was not shaken one iota on cross-examination, was supported as to surrounding circumstances by nearly every witness in the case except appellant, was medically corroborated by Dr. Stagg who examined Loretta shortly after she complained to the authorities, was psychiatrically sustained by Dr. Anderson who examined her fully and observed her on many occasions over a long period of time, and the jury believed her.

Appellee submits that the conviction on the rape counts should be affirmed, and that appellant's argument on corroboration should be rejected as not sound in law and not supported by the facts in the record.

ARGUMENT IV.

IN VIEW OF THE DEFENDANT'S ADMISSION THAT THE "HOSTILITY" OF THE COMPLAINING WITNESS WAS GENERATED ONLY BY ACTS OF PARENTAL DISCIPLINE AND WAS NOT OF A CONTINUING NATURE, IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT IN ITS SOUND DISCRETION TO LIMIT THE SHOWING OF HOSTILITY TO A PERIOD OF 30 DAYS PRIOR TO THE INITIATION OF THE CHARGES.

The trial court was justified in limiting the showing of hostility to a period of 30 days prior to bringing the charges (R. 259). In view of the defendant's admission (R. 258) that Loretta didn't remain hostile after being disciplined, it would have been highly prejudicial to the Government's case and extremely degrading for the witness, to have all the occasions warranting discipline, paraded before the jury, when they were completely immaterial to the issues involved. These, as every one knows, are normal occurrences in the development of a child. But to allow the accumulated incidents of 5 years to be paraded before the jury in kaleidoscopic succession is unjust as well as completely immaterial.

The rule has been well stated in 58 Am. Jur. 383, § 707, and although found in a secondary source common sense compels its acceptance.

. . . The fact that the hostility arose a considerable period prior to the date of the trial would appear to be no reason for the exclusion of the evidence if the hostility and prejudice had continued. But it would seem to be necessary to make it appear either that the hostility exists at the time of the trial, or that it arose so recently that it can be assumed to continue. . . .

[Rule applied in:

Blackman v. State, 102 So. 147 (Ala. 1924).]

[Rule stated in:

State v. Kenstler, 184 N.W. 259, 260 (S.D. 1921).]

The scope to be allowed in showing bias should be left to the sound discretion of the trial judge. 3 Wigmore, *Evidence*, (3d ed.) 504, § 950:

... The inferences in the present sort of evidence is from conduct or language to feelings inspiring it; and the only question is whether from the conduct or language a palpable and more or less fixed hostility (to one party) or sympathy (for the other) is inferable. Such questions should be left largely to the discretion of the trial court.

In view of the defendant's own admission it can hardly be said that the 30 day limitation imposed by the Court was an abuse of discretion.

ARGUMENT V.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN STRIKING THE BAD CHARACTER TESTIMONY WHEN, AS THE RECORD CLEARLY SHOWS, THE CHARACTER WITNESSES WERE NOT PROPERLY QUALIFIED TO GIVE TESTIMONY AS TO LORETTA LINDSEY'S REPUTATION IN THE COMMUNITY FOR TRUTH AND VERACITY.

Appellant contends it was reversible error for the Court to strike the testimony of the three character witnesses called to testify to Loretta Lindsey's bad reputation for truth and veracity (R. 351-369).

It is not enough that a character witness be acquainted with the witness sought to be impeached, *he must be properly qualified* to give reputation evidence. 3 Wigmore, *Evidence*, (3d ed.) 17, § 691:

. . . When the character of a party or of a witness is to be evidenced by reputation the reputation must itself be proved by a witness qualified by an opportunity to obtain knowledge of it.

and where the witness fails to qualify the testimony elicited on direct examination is properly stricken. *Shewitz v. U. S.*, 293 F. 581 (6th Cir. 1923).

To be properly qualified the witness must know the general opinion in the community, and although it is not necessary that the witness have talked with a majority of the members of the community, he must at least have heard the "utterances" of a representative minority. 5 Wigmore, *Evidence*, (3d ed.) 484, § 1613.

What is a representative minority depends upon the facts and circumstances of each case. But it is generally held that conversations with one or two persons do not qualify the witness to testify concerning the reputation involved. *Commonwealth v. Rogers*, 136 Mass. 158 (1883); *State ex rel. Seeburger v. Pickett*, 210 N.W. 782 (Ia. 1926); Rule stated in *People v. Root*, 245 P. 2d 679, 638 (Cal. App. 1952); *Vickers v. People*, 73 Pac. 845, 846 (Colo. 1903); *City of South Bend v. Turner*, 71 N.E. 657 (Ind. 1904); cf: *Girch v. State*, 177 N.W. 798 (Neb. 1920) (Held; testimony properly admitted where witness had

talked with 15 or 20 people in a community of 200); Anno. 92 Am. St. Rep. 28.

Examining defendant's witnesses in the light of these qualifications we find that Orville C. Johnson talked to a number of people back in 1950 (R. 359) and that was apparently concerning some missing articles and the witness' reputation for honesty. The only recent conversation was with Mr. and Mrs. Baer (R. 359) and this too apparently concerned theft and not truth and veracity (R. 360).

The conversations in 1950 and 1951 were of course too remote particularly where the witness sought to be impeached was only 10 years old at the time. In *State v. Thomas*, 113 P. 2d 73 (Wash. 1941), it was held not an abuse of discretion to exclude, as too remote, evidence of 13 year old girl's tendency to lie which took place two years prior to trial. Also Mr. and Mrs. Baer are hardly representative of the city of Ketchikan. Therefore the testimony of Orville C. Johnson, long-time friend of the defendant (R. 360) was properly stricken as coming from a witness not properly qualified to speak on Loretta Lindsey's reputation for truth and veracity.

The same can be said of the witness Bill Tatsuda, he too was a long-time friend of the defendant (R. 362). He had only overheard a conversation between two people, *one of whom was the defendant* (R. 363). He also testified that he had heard her reputation discussed other times but he couldn't remember where or when (R. 363). Surely it was not an abuse of discretion to strike this testimony.

The testimony of Robert E. Baer is no better. He talked only to Mr. and Mrs. Cal Johnson and Larry Pawsey, the uncle of the complaining witness, and had overheard conversations about the case up at the V. F. W. Club (R. 367).

It is the belief of the appellee that the record clearly shows that the three character witnesses did not know Loretta Lindsey's reputation in the community for truth and veracity, that they therefore were not qualified to speak on this girl's reputation, and that the testimony was properly stricken as being not good reputation evidence.

The trial courts have a broad discretion in this area and should not be reversed except on a showing of clear abuse. *Michelson v. United States*, 335 U.S. 469, 480 (1948):

. . . Both propriety and abuse of hearsay reputation testimony, on both sides, depends upon numerous and subtle considerations, difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will courts of appeal disturb rulings of trial courts on this subject.

ARGUMENT VI.

IT WAS NOT PREJUDICIAL MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY TO ATTEMPT TO SHOW A SIMILAR OFFENSE WITH ANOTHER YOUNG GIRL AS EVIDENCE OF A COMMON CRIMINAL DESIGN OR LUSTFUL DISPOSITION, NOR WAS IT IMPROPER TO SEEK TO IMPEACH THE DEFENDANT BY QUESTIONING HIM ABOUT THIS PRIOR IMMORAL ACT, WHERE THE TRIAL COURT SUSTAINED DEFENDANT'S OBJECTIONS AND WHERE THE INTRODUCTION OF THIS EVIDENCE FOR EITHER PURPOSE IS RECOGNIZED IN MANY JURISDICTIONS.

On two occasions the United States Attorney sought to introduce evidence of a prior sexual offense committed on Florence Dalton, once on the Government's direct case as evidence of pattern, motive, intent, and common design (R. 145) and once on cross-examination to impeach the defendant (R. 370, 371). Each time Court sustained defense counsel's objections and each time no request was made to have the preliminary questions struck or disregarded. This same subject, the prior crime on Florence Dalton, cropped up once again inadvertently during the playing of the sodium pentothal interview recording (R. 395, 396). However, here the volume was immediately reduced so that the jury heard only the preliminary questions. The jury had twice before been exposed to these introductory questions so repetition neither added to, nor detracted from, their overall knowledge.

Concerning its use in the first instance (R. 145), there is a split of authority on the question whether the prosecution in a rape case may on its direct case introduce evidence of a similar crime committed by

the defendant on one other than the complaining witness. Admittedly the majority view is that in statutory rape cases, similar offenses with other girls are inadmissible, 167 A.L.R. 565, 588. However, a minority holds that this type of evidence is admissible, 167 A.L.R. 565, 590. For a discussion of this question see *Bracey v. United States*, 142 F. 2d 85, 88 (D.C. Cir. 1944), *cert. denied*, 322 U.S. 762 where the Court found it unnecessary to rule on the question but was of the opinion that the *better reasoned* cases were in favor of admission.

The foregoing discussion was entered into merely to show that there is significant authority for the admission of this type of evidence. Therefore in view of this divergence and the fact that the question has never been decided in the Territory of Alaska it was perfectly proper for the United States Attorney to offer this evidence for the Court's ruling. It was done in good faith and with some confidence that the Court might concur in the reasoning accepted by the minority of Courts.

Since the question was one of first impression in the Territory of Alaska it would not have been reversible error for the Court to have adopted the minority view on this matter and overruled defendant's objection. It follows therefore that if it would not have been error to admit the evidence, *a fortiori* its exclusion could not have been error.

The second claimed error was the attempt by the United States Attorney to elicit from defendant an

admission that he had committed a similar sexual offense on Florence Dalton. Here again there is ample authority for the asking of this type of question to impeach a witness. 3 Wigmore, *Evidence*, (3d ed.) 547-550, §§ 981, 982. The attitude of the Federal Courts is indicated by *Coulson v. U. S.*, 51 F. 2d 178, 181 (10th Cir. 1931):

If the defendant takes the witness stand, a different rule comes into play. He steps out of his character as a defendant, for the moment and takes on the role of a witness, and as such becomes subject to cross-examination in the same manner and to the same extent as any other witness . . . questions asked on cross-examination for the purpose of impeachment should be confined to acts of conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth" [citing cases].

Since there is a recognized form of impeachment the United States Attorney had every reason to believe that, subject to the trial court's discretion in this area, he could compel the defendant to answer. Merely because the Court had excluded the evidence earlier when offered under a different theory (R. 145), it did not mean that the evidence was inadmissible under any theory. Even at the time of excluding the evidence, the Court indicated it might possibly be admitted later (R. 146).

Thus since the United States Attorney had in both instances reasonable grounds for assuming the evidence could be admitted it was not improper for him to offer it, nor was it any more prejudicial to the defendant than any other instance where evidence is offered and excluded. To hold otherwise would force the United States Attorney to run the risk of committing reversible error everytime he sought to introduce evidence under a rule that had not been precisely defined by prior Alaskan divisions. The defendant was no more prejudiced by these abortive attempts to introduce evidence than Loretta Lindsey was by the introduction of improper reputation evidence (R. 350-369). Counsel's recourse in these instances is to have the evidence stricken from the record, request the Court to instruct the jury to disregard it and to rehabilitate his witness on re-direct examination.

What the jury was able to hear of this matter while the recording was being played (R. 395, 396) was merely harmless repetition of the same preliminary matter and certainly not of such a prejudicial nature as to require a reversal.

With regard to appellant's contention that it was error for the Government to bring out the other acts of misconduct between defendant and the prosecutrix, suffice it to say that it is well recognized if not universally held in sex cases that prior acts between the same parties may be introduced to show a disposition to commit the act. *Hodge v. U. S.*, 126 F. 2d 849 (D.C. Cir. 1942); 2 Wigmore, *Evidence* (3d ed.) 355-368, §§ 398, 399; 167 A.L.R. 565, 574:

In most jurisdictions it is recognized that in prosecution for statutory rape, or rape of a female under the age of consent or otherwise unable to consent, evidence is admissible which tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness, such evidence being admitted in corroboration of the offense charged or to prove identity, and not to prove a separate offense.

ARGUMENT VII.

THE TRIAL COURT'S COMMENTS AT THE TIME OF RESERVING FOR LATER DECISION THE QUESTION OF THE ADMISSIBILITY OF THE RETRACTION STATEMENT, DID NOT CONSTITUTE REVERSIBLE ERROR WHEN VIEWED IN THE LIGHT OF THE FACTS AS THEN DISCLOSED, AND THE COURT'S CLEAR EXPLANATION OF ITS POSITION; PARTICULARLY WHEN THE RETRACTION STATEMENT WAS LATER ADMITTED IN EVIDENCE AS DEFENDANT'S EXHIBIT "B".

The trial court's comments were to the effect that although he was not intimating any actual coercion had been used, the circumstances were such that implied coercion.

For complete understanding, these comments must be reviewed in the light of the circumstances leading up to the making of the retraction statement.

Loretta Lindsey made a charge that her stepfather had over a period of five years taken sexual advantage of her presence in the Lindsey household. The story was told to a number of people outside the family and formal charges were filed on April 12, 1954. She was immediately taken out of the home

and, through the Welfare Department, placed in the Krepps' home in Wrangell, 80 air miles away. Thus, a young 14 year old girl is suddenly taken away from her family and friends in the community. Being suddenly uprooted had its effects on her. She missed the family, particularly the Lindsey children (R. 39), and this is confirmed by Defendant's Exhibit A. On August 24 she returned to Ketchikan and the next morning went straight to the Lindsey home, offering to drop the charges. Those are the undisputed facts which led up to the retraction statement.

To summarize, a 14 year old girl charges her stepfather with a despicable crime; she immediately is removed from her family and placed in the hands of strangers; she misses her adoptive mother, the Lindsey children, possibly even the defendant; and she longs to return to the family fold and community friends.

It is perfectly obvious, as it was to the Court, that here is a situation latent with psychological coercion. *Whether or not the original charges are true or false* is beside the point, to return to the family circle this young girl had *one* choice—retract—repudiate—the accusations made against the very man who controlled her readmission into the family. Her desire to be reunited with the family and the obvious step she had to take to attain that goal, regardless of the truth or falsity of the charges, were the circumstances that the Court had in mind when commenting on the admissibility of the retraction statement. It is not necessary to set out here all the comments made by the

Court on this matter. They are found on pages 193, 194, 196, 197 and 198 of the record. However, two are set out here for illustration (R. 197, 198):

. . . The Court. It isn't so much—my ruling doesn't for a moment imply that there was any actual coercion or any psychological pressure or anything of the kind. My ruling involves the question of whether or not the circumstances and the relationship of these people were not such as to imply undue influence and coercion without anything having been said, but of course there is testimony here of the complaining witness that answers were suggested to her by the defendant.

* * * * *

The Court. Oh, that is not stating the situation here. The crucial thing here is the relationship between the parties and the undue influence that one had within his power to exercise over the other. That is the crucial question. You may call your next witness, or is there cross-examination?

It is appellee's contention that, in view of the coercion inherent in the situation, the trial court was justified in reserving the question of the admissibility of the retraction statement and also justified in making the explanatory comments that accompanied this ruling.

Any possible ambiguity resulting from the Court's comments was immediately dispelled by his repeated explanations of the position he was taking and the meaning he intended to convey. Not once but twice the Court made it emphatically clear that he was not implying that the *defendant had exercised any actual*

coercion or psychological pressure, but only that the circumstances and the relationship of the people were such as to imply undue influence (R. 194, 197).

Since the judge was justified in making these comments and since any possible taint the comments might have suggested was completely dissolved by the Court's clear explanation, the defendant could not possibly have been prejudiced by the trial court's statements. The situation here involved is a far cry from the extremes found in the cases of *Quercia v. U. S.*, 289 U.S. 466, and *Williams v. U. S.*, 93 F.2d 685, cited by appellant; and the comments made fall far short of abusing that broad discretion allowed a federal judge in commenting on the evidence.

ARGUMENT VIII.

THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY OF APPELLANT THAT THERE WAS A FEELING OF HOSTILITY BY LORETTA LINDSEY TOWARD VICTORIA LINDSEY, AUNT BY BLOOD AND ADOPTIVE MOTHER OF LORETTA AND WIFE OF APPELLANT, WHEN THERE WAS NO FOUNDATION LAID FOR SUCH IMPEACHMENT AND WHEN THE RECORD CLEARLY SHOWS THAT NO HOSTILITY DID IN FACT EXIST.

On this appeal, appellant raises an objection which was not made to the trial court, viz., that it was reversible error to exclude appellant's testimony concerning hostility toward Victoria Lindsey on the part of Loretta Lindsey (Appellant's Brief pp. 13, 16 and Argument VII). This was offered to show a motive for fabricating the rape and sodomy charges against appellant. It is significant to note that no sufficient

foundation was laid for such hostility impeachment and that when Victoria Lindsey was on the stand no attempt was made to show acts of hostility referable to her. Appellant's references to the record at pages 211, 216, 217, 226 and 227 do not support his argument.

On the contrary, the record negates any feeling of hostility toward Victoria Lindsey (R. 35, 55, 87-90 and Defendant's Exhibit "A"). The only basis in the record for appellant's argument is in his own direct testimony when he testified that neither of the adopted children had any respect for their mother (R. 254-255). Appellant attempted to introduce a card, which was objected to as incomprehensible (R. 56-57), purporting to have been written by Loretta to the effect that she would always hate Victoria (R. 299). The Court ruled that it was immaterial (R. 299).

Appellant has cited no authority in support of his argument that exclusion of evidence of hostility toward Victoria was error. Appellee has found no such authority and contends that the trial court ruled correctly in excluding an attempted impeachment upon an immaterial collateral matter. It is respectfully urged that the trial court exercised a sound discretion and that the ruling should be upheld.

CONCLUSIONS.

1. There is no doubt today that psychiatric testimony is acceptable and admissible in evidence. The courts recognize that a psychiatrist is particularly well fitted

for evaluating the character and credibility of witnesses, especially if it is shown that the expert opinion is based upon a full clinical psychiatric examination. Since psychiatric testimony for impeachment or rehabilitation of an impeached witness is generally admissible today, it follows logically and necessarily that the jury be given the bases for such expert opinion in order to determine the weight to be given, if any, to the opinion itself.

In cases involving sex offenses against children under age who have consented to the acts, there is a greater need for psychiatric testimony and in this area the courts have shown the greatest liberality in admitting psychiatric testimony concerning the character and credibility of the defendant and witnesses. Combined with this growing trend, is the general trend of the law of evidence toward vesting more discretionary powers in the trial judge who is in intimate contact with the living drama of the trial and who has the opportunity to observe all the participants.

Moreover, in these consent-under-age sex cases, it is imperative to have the complaining witness thoroughly examined by a psychiatrist and a general physician in order to prevent the acquittal of a guilty man as well as to protect the innocent. The record in the case at bar clearly demonstrates how carefully Loretta Lindsey was examined by Dr. Anderson and Dr. Stagg. Without the medical testimony of Doctors Anderson and Stagg, the case would have been nothing more than Loretta's word against appel-

lant's. This would be true, appellee contends, in every case of sexual misconduct by an adult upon a child under his care and control, unless there was an eyewitness or an incriminating photograph available. The very secrecy and underhandedness of this kind of outrage demands the use of scientific testimony in the interest of social and moral justice for all.

It is significant to realize that a psychiatric examination, and the use of narcoanalysis itself, is likely to be more effective on a subject whose mentality is immature, as Dr. Anderson testified, because such a young subject could hardly deceive a skilled examiner.

Conceding the desirability of admitting, in the sound discretion of the trial court, psychiatric testimony for impeachment or rehabilitation of witnesses, it is only fair to permit the jury to evaluate the weight to be given to such expert testimony. Where a sodium pentothal interview forms a part of the foundation upon which the expert psychiatric opinion is based, the jury is entitled to know the results of the narcoanalytic interview. To deprive the jury of this opportunity is contrary to common sense, especially where the expert opinion is not based upon a hypothetical question. Appellee contends that the overwhelming weight of authority supports its contention that the recorded transcript of Loretta's drug-induced statements was admissible, in the trial court's discretion in this difficult consent-under-age sex case, to enable the jury to evaluate Dr. Anderson's psychiatric opinion of Loretta's good character and credi-

bility. The trial court did not abuse its discretion, and its ruling should therefore be affirmed.

2. The recording of the sodium pentothal interview was properly admitted into evidence as a prior consistent statement after Loretta Lindsey had been impeached by reading into evidence a prior inconsistent statement, by showing her hostility toward the defendant, and by insinuations that part of her story was a recent contrivance. It is recognized by most courts, particularly the federal courts, that under these circumstances a prior consistent statement may be introduced if there are sufficient safeguards guaranteeing its truthfulness. The safeguards employed by the prosecution, i.e., psychological tests, psychiatric examination, and finally sodium pentothal, are far better suited to preventing fabricated self-serving corroboration than those safeguards recognized as rendering other forms of hearsay admissible. Surely statements admitted as *res gestae*, dying declarations, declarations against interest, etc., are not as free of doubt as this statement elicited under sodium pentothal by a competent psychiatrist, after a complete clinical examination.

3. In Alaska, the common law of crimes is in effect unless changed or modified by statute. Section 65-1-3 ACLA 1949. At common law, no corroboration of a woman complainant in a sex case is required. The only statutory modification of this common law rule in Alaska is Section 66-13-61 ACLA 1949 which specifically requires corroboration in abduction and

seduction cases. It is clearly inferable that the Legislature did not intend to change the common law rule with regard to rape and sodomy.

Assuming, *arguendo*, that some corroboration is required, appellee submits that the record shows ample corroboratory evidence. The reported decisions in other jurisdictions strongly indicate that "corroboration", especially in consent-under-age sex cases, means nothing more than proof of the *corpus delicti*, which should be left to the discretion of the trial court, or the clarity and convincing power of the prosecutrix, which ought to be in the exclusive province of the jury.

4. It was not reversible error for the trial court to limit the showing of hostility to a period of 30 days preceding the charges. After the defendant's admission that Loretta's hostility was not of a continuing nature, the Court very properly limited the showing of hostility. There was no necessity to degrade and blacken this witness when the evidence sought to be obtained was, by the defendant's own admission, immaterial, and the Court properly so held.

5. The three character witnesses introduced by the defense were definitely not properly qualified to give reputation evidence, and their testimony was rightly stricken. The record indicated that the witnesses did not know Loretta's reputation for truth and veracity, had only talked with a handful of people, and most of this conversation concerned her reputation for honesty three to four years before the charges were brought.

6. In view of the split of authority on the admissibility of evidence of other offenses, the United States Attorney did not indulge in prejudicial misconduct in trying to introduce evidence of a prior sexual offense of appellant. The trial court, in its sound discretion, sustained appellant's objection. On cross-examination, it is proper to impeach by asking about a specific act of immoral conduct, but again the trial court, in its discretion, sustained appellant's objection. If the trial court had ruled in favor of the Government, there would be no basis for predicated error. *A fortiori* there could be no prejudicial error when the ruling favors appellant.

7. The trial court's comments made at the time of reserving for later decision the admissibility of the retraction statement, were fully justified by the circumstances and the relationship of the parties. Regardless of the true facts Loretta Lindsey had to repudiate her accusations to regain the family fold. The trial court had some doubt as to the voluntariness of a statement made under this terrific emotional strain, and rightfully stated the reason for his hesitancy. In view of the clear explanation of his meaning, no possible prejudice could have resulted to defendant. The Court's explanation of why it was reserving the question was only common courtesy to the parties and certainly not reversible error.

8. The trial court wisely and correctly excluded testimony of appellant concerning a supposed hostility of Loretta toward Victoria Lindsey. This was attempted impeachment on an immaterial collateral

matter, and lay within the discretion of the trial court. Moreover, a reading of the record plainly shows that there was no hostility in fact toward Victoria.

Therefore, the judgment and verdict below are sustained by ample and competent evidence in the record. The trial court committed no error and its judgment, appellee respectfully urges, should be affirmed.

Dated, Juneau, Alaska,
August 26, 1955.

Respectfully submitted,

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(Appendices Follow.)

Appendices.

Appendix "A"

NOTE, 26 INDIANA LAW JOURNAL 98-103 (1950),
QUOTED IN FULL.

CRIMINAL LAW.

PSYCHIATRIC AID IN EVALUATING THE CREDIBILITY OF A PROSECUTING WITNESS CHARGING RAPE.

Unfortunately, in prosecutions for rape, evidence tending to corroborate the testimony of the prosecuting witness is often lacking. Where this situation exists, determination of guilt is dependent on the resolution of two contradictory statements, viz., the accusation of the prosecutrix, and disavowal by the defendant. Unlike most criminal prosecutions, where additional evidence is presented by witnesses and through physical manifestations of probability, this not infrequent situation has only these two antithetical ingredients. And while the individual temperament of each juror is an inescapable constituent of our criminal system, a lack of evidence corroborating the prosecutrix virtually erases the possibility of an objective approach in evaluating her credibility. When the morally reprehensible nature of the crime and the ease with which persons may be falsely accused of rape are considered, the full import of this problem becomes manifest. Certainly, every effort should be made to minimize this perplexity.¹

¹This patent weakness in the judicial process is forcibly demonstrated by a recent Indiana case in which the defendant was convicted of rape. The only evidence to establish the crime was the testimony of the prosecuting witness, who later specifically denied that defendant had committed the offense charged. Nevertheless, the judgment of the lower court dismissing the motion for new trial was affirmed by the Indiana Supreme Court. Yessen

Under these circumstances, the majority of states adhere to the common law rule that in a trial for rape the testimony of the female alone is sufficient to support a conviction.² Contrary to the logical in-

v. State, 92 N.E.2d 621 (Ind. 1950) (Judges Gilkison and Emmert dissenting).

A second feature of this case (a commentary on legal method particularly correlated to Indiana practice) is presented by the summary treatment given it by the Indiana Supreme Court. The motion for new trial was supported by affidavits, one of which contained prosecutrix's denial that the crime had been committed. Arbitrarily invoking an archaic procedural requirement, the Supreme Court refused to consider these affidavits because they were not contained in a special bill of exceptions, showing that they had been introduced in evidence at the hearing on the motion. The court has long been careful to enforce the rule that affidavits filed with a motion for new trial are in the record on appeal only if incorporated into the record by a bill of exceptions. See, *e.g.*, *Butler v. State*, 223 Ind. 260, 60 N.E.2d 137 (1945); *Alexander v. State*, 203 Ind. 288, 164 N.E. 259 (1928); *Kleespies v. State*, 106 Ind. 383, 7 N.E. 186 (1886). This requirement assures the court that opposing counsel had opportunity to introduce counter-affidavits at the hearing on the motion. But meritorious questions involving a defendant's personal liberty should not be lightly ignored; and here was a situation in which defendant's conviction of a serious crime could be sustained only upon testimony expressly repudiated. Yet, this was not considered cognizable because a procedural rule had not been complied with. Certainly, the questionable wisdom of rigidly adhering to such a formalistic requirement does not offset this disastrous consequence. The best solution to this unfortunate situation would be adoption of the rule proposed by the Judicial Council of Indiana, wherein opposing counsel is given a period within which to file counter-affidavits after a motion for new trial has been filed; and which provides that affidavits filed shall be considered as evidence and shall not be introduced at the hearing on the motion. The latter provision is expressly designed to repudiate the existing Indiana rule. Report of The Judicial Council of Indiana 29 (1948).

²*E.g.*, *People v. Murray*, 91 Cal. App.2d 253, 204 P.2d 624 (1949); *State v. Chuchelow*, 131 Conn. 82, 37 A.2d 689 (1944); *People v. Sciales*, 345 Ill. 118, 177 N.E. 689 (1931); *Abshire v. State*, 199 Ind. 474, 158 N.E. 227 (1927); *Commonwealth v. Bemis*, 242 Mass. 582, 136 N.E. 597 (1922); *Commonwealth v. Oyler*, 130 Pa. Super. 405, 197 Atl. 508 (1938). See also 7 WIGMORE, EVIDENCE § 2061 (3d ed. 1940).

ference, this doctrine does not owe its origin to, nor does it have any especial significance because of, the particularly heinous nature of the crime. It is merely an example of the general absence in Anglo-American law of rules requiring a specific quantity of evidence.³

Recognizing the fact that severe injustice may ensue from a failure to require more substantial proof of guilt where rape is charged, several states insist that the prosecuting witness' accusations be substantiated.⁴ On first impression this would seem highly desirable since the crime is usually committed under clandestine circumstances, making false accusations with appropriate detail relatively easy.⁵ Moreover, the commission of the offense is so repugnant to the mores of society that the disposition of a defendant's

³See 7 WIGMORE, EVIDENCE § 2032 *et seq.* (3d ed. 1940).

⁴Some jurisdictions have adopted this policy through legislative action. For instance, N.Y. Penal Law § 2013 recites that, "No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence." In others, the rule is a creature of judicial invention. "A judgment of conviction . . . based upon the testimony of the prosecutrix alone cannot be sustained . . . unless the circumstances surrounding the commission of the offense are clearly corroborative of her statements." *State v. Hines*, 43 Idaho 713, 715, 254 Pac. 217, 218 (1927).

⁵Often quoted is Lord Hale's classic statement, "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished . . . but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party, accused, tho never so innocent." IP.C. 633, 635 (1680). And in the eighteenth century Montesquieu, though bitterly condemning the "crime against nature," wrote, "As natural circumstance of this crime is secrecy, there are frequent instances of its having been punished by legislators upon the deposition of a child. This was opening a very wide door to calumny." 1 MONTESQUIEU, THE SPIRIT OF LAWS 203 (Pritchard's ed. 1906).

case is likely to be influenced more by prejudice inspired by aroused public emotion than by a considered view of the evidence.⁶ The severity of the penalty⁷ and the inevitable social ostracism further accentuate the need of adequately protecting the accused from conviction on false charges.

The serious nature of the crime makes it equally essential, however, that courts and legislatures do not require a method of proof which places an unreasonable burden upon the state. In many cases there will be circumstances surrounding the alleged commission of the offense, in a few instances even witnesses, to either verify or discredit the prosecutrix's testimony.⁸

⁶In *Roberts v. State*, 106 Neb. 362, 365, 183 N.W. 555, 557 (1921), the court recalled that, "Public sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with. . . ."

⁷Conviction in North Carolina carries a mandatory death penalty. N.D. GEN. STAT. § 14-21 (1943). In several states death, or life imprisonment, may be imposed. See, *e.g.*, ARK. STAT. ANN. tit. 41, § 3403 (1947); MASS. ANN. LAWS c. 265, §§ 22, 23 (1942); MICH. COMP. LAWS § 750.520 (1948).

⁸In *State v. Leavitt*, 44 Idaho 739, 260 Pac. 164 (1927), the court found corroboration sufficient to sustain a conviction from evidence that prosecutrix was tearful upon complaint to her mother soon after the alleged rape; her body was bruised and scratched, her underclothing torn and stained, and her sexual organs lacerated; and her broken watch was found among trampled weeds at the location where the crime was allegedly committed. In *Cascio v. State*, 147 Neb. 1075, 25 N.W.2d 897 (1947), defendant admitted the act of intercourse, but the complaining witness was not corroborated in her denial of consent when there was no evidence of physical injury nor of torn clothing, and she admittedly made no effort to escape though she had opportunity to do so. But in *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947), where defendant admitted the intercourse and alleged consent, prosecutrix was corroborated by evidence that her back, eye, and wrists were bruised, her neck was discolored, and she was hysterical upon complaining to a doctor soon afterwards.

On such occasions a rule which unequivocally requires that the complainant be corroborated serves well its laudable purpose of protecting the accused, without unduly handicapping the state's efforts to punish, or otherwise deal with, sex offenders. But the situation is reversed when there is an absence of such corroboration and the prosecutor must ground his case solely on the recital of the complaining witness.⁹ And while the surreptitious perpetration of the crime is significant when considering the danger of false accusation, it is of equal consequence when proving the corpus delicti. Thus, if the prosecuting attorney is unable to secure other evidence substantiating the complainant's testimony, the state is powerless to deal with defendants who are in fact guilty. In this area a general rule of corroboration would accordingly break down by protecting the culpable as well as the guiltless. The problem thereby evolved is that of formulating some method of proof which will not

⁹In *People v. Romano*, 279 N.Y. 392, 18 N.E.2d 634 (1939), the court held that the other evidence necessary to corroborate the prosecutrix was lacking where she identified defendant as one of a group of men who allegedly assaulted her, and swore that he raped her when her powers of resistance had been beaten down in an effort to repulse the others. And in *People v. Pandeline*, 141 Misc. 241, 251 N.Y. Supp. 384 (1931), an indictment for rape was dismissed because corroboration of complainant's charge that she was raped by defendant in a taxi was entirely lacking.

There may be evidence other than the testimony of the prosecuting witness, but not of sufficient caliber to constitute corroboration. For instance, other evidence tending to show only that defendant had opportunity to commit the crime is generally held insufficient in those states where corroboration is required. *State v. Bowker*, 40 Idaho 74, 231 Pac. 706 (1924); *Roberts v. State*, 106 Neb. 362, 183 N.W. 555 (1921).

impede the state's efforts to deal with offenders, and yet be flexible enough to protect the innocent.

The need for flexibility is further accentuated by the fact that false accusations of sex offenses may be engendered by personality disturbances not discernible to a court or jury.¹⁰ This renders a courtroom appraisal of the complainant's testimony virtually impossible. For despite the mental disorder, if that is present, the individual may have a highly intelligent and extremely convincing manner.¹¹ An adequate evaluation of her credibility can be made only after a diagnosis based upon a psychiatric inquiry into the physical, mental, and social history of the prosecutrix.¹² Thus, the opportunity of the court and jury to observe the demeanor of the witness is of little consequence.

The desideratum can be attained by giving the prosecuting attorney, in all cases where rape is charged, the right to petition the court for appointment of

¹⁰See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), and the discussion of case histories reprinted there. See also HEALY, THE INDIVIDUAL DELINQUENT 729-752 (1915); Glueck, *The Forensic Phase of Litigious Paranoia*, 5 J. CRIM. L. & CRIMINOLOGY 371 (1914).

¹¹*Ibid.* Most mental illnesses produce little or no outward change in demeanor. HENDERSON & GILLESPIE, A TEXTBOOK OF PSYCHIATRY 101 (6th ed. 1947). Aschaffenburg, in *Psychiatry and Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 3 (1941), recalls that, "For over thirty years I have found that even well educated people when shown around in my clinic asked me at the end of such a visit where the excited patients were kept. They never realized that the madman of their imagination was but a rare exception." See also OVERHOLZER & RICHMOND, HANDBOOK OF PSYCHIATRY 9-10, 30 (1947).

¹²See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), esp. the letters from Drs. W. F. Lorenz, Karl An Menninger, Otto Mönckmüller, and William A. White reprinted there.

qualified psychiatrists to examine the prosecuting witness.¹³ This examination would be made before trial, and a report of the findings presented in evidence. Presumably, this psychiatric inquiry would be requested only on those occasions where strong corroborative evidence is not available.¹⁴ As a means of insuring the prosecuting attorney's compliance with this procedure, the court would determine whether there is any evidence tending to substantially verify the complainant's testimony. And in those cases where the state introduces no evidence of corroborative rank, the court would be disposed to find the defendant not guilty.¹⁵ This exercise of judicial discretion is justifiable when two decisive factors are recalled: False accusations of sex offenses *are* made by persons affected with personality disturbances, and these disorders usually are *not* discernible to laymen.¹⁶ Hence, when the state offers no corroborating

¹³Despite frequent attacks, the probative value of psychiatric examination is generally recognized. See notes 19, 20, and 21 *infra*.

¹⁴It is likewise presumed that where there is no corroborating evidence, and the psychiatric inquiry reveals that the complaint has no merit, the state would decline to press charges.

¹⁵If the cause were being heard before a jury, presumably the court would direct a verdict of acquittal. See note 16 *infra*.

¹⁶The tremendous significance of these two facts cannot be overemphasized, for they comprise the fundamental reason why a wholly subjective appraisal of prosecutrix's credibility by the court or jury is so likely to result in severe injustice, and why a substitute method of evaluation must be found in the realm of psychiatric investigation. Normally it is said to be an invasion of the province of the jury for the court to direct a verdict where the determination of an issue involves the weight of evidence or the credibility of witnesses. See, *e.g.*, *State v. Torphy*, 217 Ind. 383, 28 N.E.2d 70 (1940). Obviously, such a doctrine can have no application in the situation envisaged here.

evidence, and no psychiatric report, it would not be assumed that the witness is a normal individual, notwithstanding the persuasiveness of her testimony.¹⁷ By this method the responsibility and the means of verifying the statements of the complaining witness are placed squarely upon the state.¹⁸

Courts have long admitted psychiatric evidence where sanity is an issue,¹⁹ and although they have not always been so willing to receive evidence of lesser mental illness, the value of psychiatric diagnosis in

¹⁷It is recognized that not every false accusation of rape has its inception in a disordered mind, that motivation may be supplied by a desire to gain revenge, to blackmail, to escape public disapprobation, or by other exigencies. Admittedly, the proposed reform suggests no panacea for this type of situation.

¹⁸The circumstances in *Yessen v. State*, 92 N.E.2d 621 (Ind. 1950), see note 1 *supra*, present a situation ideally suited to the application of the procedure suggested here. Prosecutrix was a twelve year old child, apparently possessing delinquent tendencies, who had been deserted by her natural parents and placed by the County Welfare Department in a strange home with a couple employed by the department to give her room and board and to send her to school. That she was from two to three years behind in school is indicated by the fact that she was in grade 4-B. At the trial, which resulted in defendant's conviction of rape, the state introduced no evidence tending to support her testimony that the crime had been committed. After the trial she retracted her statements. Under the recommended procedure the state would not have been permitted to rely so heavily on the testimony of prosecutrix, and the absence of corroborating evidence would have necessitated a request for psychiatric aid in evaluating her credibility. Certainly, the background of this girl and her behavior subsequent to the trial suggest the strong possibility that had such a course been followed, the doubtful conviction would never have occurred.

¹⁹3 WIGMORE, EVIDENCE § 932 (3d ed. 1940). Many state statutes and the Federal Rules of Criminal Procedure expressly authorize appointment of experts to examine a defendant whose sanity is questioned. Indiana, for instance, has made such appointments mandatory when the issue is raised. IND. STAT. ANN. § 9-1702 (Burns 1933).

the latter respect is by no means unrecognized.²⁰ Indeed, it is in dealing with sex offenses that the courts have been most liberal.²¹ But a serious difficulty in effectively administering the recommended procedure is presented by the dearth of qualified psychiatrists available to conduct the examinations. A similar problem is currently being encountered in effectuating sexual psychopath statutes,²² which require specialized

²⁰For example, during World War II the United States government discharged more than 500,000 soldiers for lesser psychiatric disorders. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD* 343 (1948). The Massachusetts Briggs Law requires routine psychiatric examination in all cases of capital offenses and of persons indicted for any other offense who are known to have been previously indicted more than once or to have been convicted of felony. MASS. ANN. LAWS c. 123, § 100A (1942). See also *United States v. Hiss*, 88 F. Supp. 559 (S.D. N.Y. 1950) (a psychiatrist was allowed to testify that one of the prosecution's witnesses was a psychopathic personality); *Coffin v. Reichard*, 148 F.2d 278 (6th Cir. 1945) (hospital records were admitted to show that appellant was a psychopathic personality); *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930) (expert testimony indicated that witness was a moron).

²¹Several courts have been willing to admit psychiatric evidence of mental disorders in sex complaints. *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403 (1930) (evidence that complainant was a nymphomaniac and that the diseased condition of her mind would make her testimony unreliable); *Rice v. State*, 195 Wis. 181, 217 N.W. 697 (1928) (expert testimony indicating that prosecutrix was depraved mentally, and imagined things entirely beyond reality); *People v. Cowles*, 246 Mich. 429, 224 N.W. 387 (1929) (evidence that prosecutrix was a pathological liar, a nymphomaniac, and a sexual pervert); *State v. Pryor*, 74 Wash. 121, 132 Pac. 874 (1913) (evidence that prosecutrix was suffering from hysteria); *Mell v. State*, 133 Ark. 197, 202 S.W. 33 (1918) (evidence of a prosecuting witness' insanity); *Jeffers v. State*, 145 Ga. 74, 88 S.E. 571 (1916) (expert testimony that prosecutrix was "considerably below the average" in mental development).

²²Indiana has recently enacted such a statute. IND. ACTS 1949, c. 124, p. 328, Note, 25 IND. L. J. 186 (1950).

examinations.²³ To cope with this situation, it has been suggested that official court clinics, staffed with specialists, be established in the larger cities and utilized by the surrounding areas.²⁴ Besides alleviating the difficulty experienced in administering those statutes, adoption of the proposal would provide immediate access to trained specialists when the prosecuting attorney requests a psychiatric inquiry into the background of a complaining witness charging rape. Furthermore, the facility with which an examination could be instituted would encourage the use of the clinic in all cases where the prosecutor doubts the strength of his corroborative evidence.

²³See Note, 25 IND. L. J. 186 n. 31 (1950).

²⁴*Ibid.*, 40 J. CRIM. L. & CRIMINOLOGY 186 (1949).

Appendix "B"

~~DECISION~~

~~DECISION~~, FREEDMAN, DONNELLY AND REDLICH, DRUG-INDUCED REVELATION AND CRIMINAL INVESTIGATION, 62 YALE LAW JOURNAL 315, 320-1, 327-8, 338-342 (1953). THE ORIGINAL PAGE NUMBERS HAVE BEEN RETAINED FOR CONVENIENCE. (Emphasis supplied.)

FORENSIC ASPECTS OF NARCOANALYSIS

The preceding section has considered the medical aspects of narcoanalysis and has attempted to evaluate the technique in terms of present scientific knowledge. The courts make ever-increasing use of the results of scientific research and experience. But it is well established that before a scientific discovery or technique is entitled to judicial recognition it must have passed from the experimental to the demonstrative stage by gaining "general acceptance in the particular field in which it belongs." And, assuming judicial recognition of reliability, questions may arise as to limitations upon its use. This is particularly true of narcoanalysis: Not only is it necessary to consider the reliability of the results but several of the exclusionary rules of evidence obtrude and demand attention. But beyond that, the technique sharply raises pungent questions of law, science, policy, and professional ethics which spring from the constitutional privilege against self-incrimination and the statutory physician-patient privilege. And as a "brooding omnipresence" is the gradually emerging and increasingly challenging problem of the extent to which privacy shall be invaded as truth-extracting procedures of high reliability are developed.

From the standpoint of the criminologist, narcoanalysis has the following present and potential uses, which are listed here without the expression of any value judgment:

1. *As an adjunct useful to a qualified psychiatrist who makes a full examination of personality structure for any one of the following purposes: [320]*

(f) *Estimation of character whenever this is an issue, i.e., good character of an accused in respect of a given relevant trait or good character of a witness for truth and veracity; . . .*

2. *As a primary procedure, without an otherwise full examination of personality structure, when used by a qualified psychiatrist for any of the following purposes:*

(a) *To test the veracity of any given material witness by way of corroboration, impeachment, or disqualification; . . .*

4. *As a sole procedure, e.g., when the transcript of statements made under narcoanalysis is offered in evidence as such for any of the foregoing purposes: . . . [321]*

Effect of Stipulation Upon Admissibility

Suppose that the defense and prosecution enter into a stipulation that the defendant shall undergo examination, including narcoanalysis, by a designated psychiatrist, and that the results shall be admitted in evidence without objection on the part of the party

adversely affected. The question of admissibility presented is similar to that which has arisen with respect to lie-detectors. The results of lie-detector tests have usually been admitted in civil cases by stipulation, [327] ³⁵ and by the trial courts in a few criminal cases. ³⁶ Very few cases have reached the appellate courts, and the results are inconclusive, although favoring admissibility. ³⁷ The only case involving narcoanalysis is *Orange v. Commonwealth*, ³⁸ a murder prosecution, in which the defendant sought to introduce the results of a test made pursuant to an agreement with the prosecuting attorney. The court held that the results were properly excluded since the agreement did not provide that the results of the test would be admissible in evidence. If the stipulation or agreement had so provided, the implication is that the court would have held them admissible. ³⁹ In general, contracts to alter or waive established rules of evidence are valid

³⁵See Note, 30 MICH. B.J. 6 (Feb. 1951).

³⁶Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. CRIM. L. & CRIMINOLOGY 262 (1935); Note, 26 J. CRIM. L. & CRIMINOLOGY 758 (1935).

³⁷*People v. Houser*, 85 Cal.App.2d 686, 193 P.2d 937 (1948) (properly admitted over defendant's objection); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947) (court implied that if there had been a stipulation the results would have been admissible); *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943) (excluded, but court failed to discuss the effect of the stipulation). The latter case is discussed in Note, [1943] WIS. L. REV. 430, 438, and in INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 92 n.14 (1948), both authors suggesting that the case is not controlling upon the stipulation question.

³⁸191 Va. 423, 61 S.E.2d 267 (1950).

³⁹*Id.* at 439, 61 S.E.2d at 274: "This test was made apparently on the motion of the defendant and her co-defendants, and agreed to by the Commonwealth's attorney, but with no agreement that the results should be given in evidence."

From the standpoint of the criminologist, narcoanalysis has the following present and potential uses, which are listed here without the expression of any value judgment:

1. *As an adjunct useful to a qualified psychiatrist who makes a full examination of personality structure for any one of the following purposes: [320]*

(f) *Estimation of character whenever this is an issue, i.e., good character of an accused in respect of a given relevant trait or good character of a witness for truth and veracity; . . .*

2. *As a primary procedure, without an otherwise full examination of personality structure, when used by a qualified psychiatrist for any of the following purposes:*

(a) *To test the veracity of any given material witness by way of corroboration, impeachment, or disqualification; . . .*

4. *As a sole procedure, e.g., when the transcript of statements made under narcoanalysis is offered in evidence as such for any of the foregoing purposes: . . . [321]*

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Suppose that the defense and prosecution enter into a stipulation that the defendant shall undergo examination, including narcoanalysis, by a designated psychiatrist, and that the results shall be admitted in evidence without objection on the part of the party

adversely affected. The question of admissibility presented is similar to that which has arisen with respect to lie-detectors. The results of lie-detector tests have usually been admitted in civil cases by stipulation- [327] tion,³⁵ and by the trial courts in a few criminal cases.³⁶ Very few cases have reached the appellate courts, and the results are inconclusive, although favoring admissibility.³⁷ The only case involving narcoanalysis is *Orange v. Commonwealth*,³⁸ a murder prosecution, in which the defendant sought to introduce the results of a test made pursuant to an agreement with the prosecuting attorney. The court held that the results were properly excluded since the agreement did not provide that the results of the test would be admissible in evidence. If the stipulation or agreement had so provided, the implication is that the court would have held them admissible.³⁹ In general, contracts to alter or waive established rules of evidence are valid

³⁵See Note, 30 MICH. B.J. 6 (Feb. 1951).

³⁶Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. CRIM. L. & CRIMINOLOGY 262 (1935); Note, 26 J. CRIM. L. & CRIMINOLOGY 758 (1935).

³⁷*People v. Houser*, 85 Cal.App.2d 686, 193 P.2d 937 (1948) (properly admitted over defendant's objection); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947) (court implied that if there had been a stipulation the results would have been admissible); *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943) (excluded, but court failed to discuss the effect of the stipulation). The latter case is discussed in Note, [1943] WIS. L. REV. 430, 438, and in INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 92 n.14 (1948), both authors suggesting that the case is not controlling upon the stipulation question.

³⁸191 Va. 423, 61 S.E.2d 267 (1950).

³⁹*Id.* at 439, 61 S.E.2d at 274: "This test was made apparently on the motion of the defendant and her co-defendants, and agreed to by the Commonwealth's attorney, but with no agreement that the results should be given in evidence."

and enforceable in the absence of fraud or coercion.⁴⁰ There seems to be no substantial reason why a stipulation for the admissibility of the results of narco-analysis should not be upheld, providing that the accused had the advice of counsel at the time of stipulation and that the psychiatric examination was otherwise complete and the psychiatrist qualified. [328]

Material Witnesses

Judicial resort to psychiatric examination and other scientific procedures for testing the veracity of key material witnesses in order to avert miscarriages of justice in criminal proceedings offers intriguing possibilities.⁸⁰ It is elementary that a witness to be competent must have a minimal capacity to observe, recollect, and narrate. At the *voir dire* examination on the question of competency, the judge is not bound by the ordinary rules of evidence and has full discretion to use any available aids, such as mental and psychological tests.⁸¹ The modern tendency is to permit a mentally disordered witness to testify at trial, leaving the defect in question to have whatever weight it deserves as discrediting his powers of observation, recollection, or communication.⁸² This relaxation of competency requirements has increased the need for

⁴⁰TRACY, HANDBOOK OF THE LAW OF EVIDENCE 367 (1952); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).

⁸⁰See 3 WIGMORE, EVIDENCE §§ 931-5, 997-9 (3d ed. 1940).

⁸¹2 *id.* §§ 492-501; Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 YALE L.J. 1017, 1019 (1928).

⁸²3 WIGMORE, EVIDENCE §§ 501, 931 (3d ed. 1940).

psychiatric evaluation of a personality-disordered key witness. Judicial obstructionism has taken two different forms. First, some courts, applying the traditional methods of character impeachment, have limited evidence to the reputation of the witness as evidenced by community judgment⁸³ or, in a few jurisdictions, to particular instances of misconduct.⁸⁴ But these methods, which have no bearing on defective organic capacity or personality structure, should not limit the use of expert testimony in evaluating the testimony of a witness.⁸⁵ Second, other courts apply

⁸³*E.g.*, *State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921).

⁸⁴3 WIGMORE, EVIDENCE § 979 (3d ed. 1940).

⁸⁵*Id.* at § 931:

“Since the theory of this evidence is that any defect of capacity, insufficient to exclude, and yet involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, the only proper limit upon such evidence would seem to be as follows: *Any trait importing in itself a defective power of observation* (at the time of the matter testified to), *or of recollection, or of communication*, is admissible, provided the power is substantially defective as judged by the average standard of mentality.”

Consult also *State v. Armstrong*, 232 N.C. 727, 62 S.E.2d 50 (1950), where the only eye-witness to a killing was a girl who would have been described by a doctor who had tended her—had he been allowed to testify—as “a low-class moron, equivalent of a nine-year-old child.” In holding it reversible error not to let the doctor so testify, Chief Justice Stacy said:

“It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him. . . .

“What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of the witness? If his interest, bias, indelicate way of life, insobriety and general bad reputation in the community may be shown as bearing upon his unworthiness of belief, why not his imbecility, want of understanding, or moronic comprehension, which go more directly to the point? . . . That which may be shown indirectly may also be shown directly. The law favors

these restrictions only when expert diagnosis of the lesser mental illnesses is offered to discredit, but [338] admit evidence of extreme mental derangement verging on psychosis.⁸⁶ Contrariwise, many have come to realize that psychiatry can render valuable assistance in assessing the lesser mental disorders. Recognition has been most pronounced in sex offense cases where the courts have permitted psychiatrists to expose mental deficiencies, hysteria, and pathological lying in complaining witnesses.⁸⁷ And some courts permit evidence that a witness uses drugs either to show organic impairment of testimonial powers or a propensity to lie.⁸⁸ There is also the recent example of the hypothetical psychiatric testimony introduced by the defense to impeach the witness Chambers in the trial of Alger Hiss in the Southern District of New York. The psychiatrist was permitted to testify that in his opinion the witness was a psychopathic per-

directness over indirectness; simplicity over complexity; brevity over prolixity; clarity over obscurity; substance over form. There is no virtue in the long phrase when a short one will do just as well. The court-room is not the home of redundancy or circumlocution. Conciseness is the keynote there."

Id. at 728-9, 62 S.E.2d at 51.

⁸⁶2 WIGMORE, EVIDENCE § 932 (3d ed. 1940). And see *State v. Driver*, 88 W. Va. 479, 107 S.E. 189 (1921).

⁸⁷See Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L. & CRIMINOLOGY 750 (1949); and Note, 26 IND. L.J. 98 (1950).

In 1938, the American Bar Association's Committee on the Improvement of the Law of Evidence recommended that "in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence." 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940).

⁸⁸Note, 16 So. CALIF. L. REV. 333 (1943); 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940).

sonality with "a tendency towards making false accusations."⁸⁹ [339]

Admittedly, the dividing line between truth and untruth is a shadowy one. It is debatable whether psychology and psychiatry have progressed to the point where they are able (with or without narco-analysis) to establish the truth or falsity of testimony. A recent appraisal is as follows:

"Admittedly, categorical opinions about the truth of evidence can be given only rarely. And in simple, uncomplicated situations little or no assistance could be expected. But with the more complex problems, which involve the uncontrolled fantasy formation and suggestibility of childhood, the suggestibility and unreliability of the intellectually defective and the demented, the hallucinations and delusions of the psychotic, the irresponsibility of the true psychopath, the confabulations of patients with organic brain disorders, and the unreliability of hysterics, real help could often be obtained."⁹⁰

⁸⁹See *United States v. Hiss*, 88 F. Supp. 559, 560 (1950), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) (District Judge Goddard, in discussing the problem of admissibility, said: "The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency but goes to the jury to affect credibility.")

See also Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

For a perceptive and critical appraisal of the psychiatric testimony in the Hiss case, see Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PA. BAR ASS'N Q. 140 (1951).

⁹⁰GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 365 (1952).

And it may be added that here as well as when insanity is the issue, narcoanalysis accompanying a complete and thorough examination is an important and valuable diagnostic adjunct.

If a witness agrees to submit to narcoanalysis the problem for the court is about the same as that posed by a defense offer of a voluntary narcoanalytic experiment on the defendant. If the witness does not consent several difficulties arise. *The full potentialities of psychiatric evaluation can not be realized unless the diagnosis is based upon a full clinical examination.* Therefore, to provide juries or courts with maximum psychiatric assistance there should be a clinical examination by a court-appointed psychiatrist upon a reasonable showing that a key material witness may be suffering from a mental illness likely to affect his credibility. Do courts have this power? If the competency of a witness is attacked, the judge certainly has power to appoint psychiatrists to examine the witness. His authority to do so stems either from his inherent power to summon witnesses⁹¹ or from statutes or rules confirming his authority to call experts.⁹² The *voir dire* may thus serve as a pro-

⁹¹2 WIGMORE, EVIDENCE § 563 (3d ed. 1940).

⁹²*Ibid.*, collecting and summarizing the statutes and court rules. Exercising these powers, trial judges have appointed psychiatrists to examine witnesses whose competency was questioned by opposing counsel. *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930); *Commonwealth v. Koch*, 305 Pa. 146, 157 Atl. 479 (1931). And in *Goodwin v. State*, 114 Wis. 318, 321, 90 N.W. 170, 171 (1902), the court stated that examination could be imposed as a condition precedent to testifying where the court is seriously doubtful of a witness' mental competency.

cedural device for obtaining a clinical diagnosis which will later be available for impeachment purposes.⁹³ But suppose the court finds a witness competent without clinical psychiatric examination; is there any way to get a clinical examination where impeachment is the objective? Although it is doubtful whether a court has power to order a psychiatric examination for impeachment purposes alone, the court may be willing to accomplish this result by invoking its power to determine competency, even though the witness [340] has taken the stand and even though the court remains convinced that the witness is competent.⁹⁴

If a court can order clinical examination of a witness, can the witness be required, as part of the examination, to undergo narcoanalysis? This, of course, raises problems of self-incrimination and the physician-patient privilege which are substantially the same as those already discussed in connection with the compulsory examination of defendants.⁹⁵

⁹³*People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930), and note 87 *supra*.

⁹⁴In *State v. Palmer*, 206 Minn. 185, 288 N.W. 160 (1939), psychiatric examination was allowed after the witness left the stand. The diagnosis based on this examination was then used to impeach the witness. *Contra: Goodwin v. State*, 114 Wis. 318, 90 N.W. 170 (1902).

There may be cases where a diagnosis is already available because the witness has had psychiatric treatment either privately or in a mental hospital or clinic. If narcoanalysis was a part of the diagnosis this should not prevent its use. Of course, the physician-patient privilege might prevent the use of such a diagnosis.

⁹⁵To permit either party to compel all his opponent's witnesses to submit to narcoanalysis might well lead to intolerable confusion and delay unless the technique is developed, refined, and simplified far beyond present expectations. In *State v. Cole*, 354

SUMMARY AND CONCLUSION

Conducted under properly controlled conditions by a qualified psychiatrist with experience in its use, an interview in which the subject is partially under the influence of a drug (such as the barbiturates) may be a proper and *valuable auxiliary procedure* in a thorough diagnostic examination. The be- [341] havior manifested under drug influence varies with the physiological tolerance of the subject, his person-

Mo. 181, 188 S.W.2d 43, *rehearing denied*, 189 S.W.2d 541 (1945), the defendant made a motion at the beginning of the trial for a court order requiring all witnesses in the case to be required to give their testimony while strapped to a lie-detector. In holding that the trial court properly denied the motion the Missouri Supreme Court stated:

"In our opinion the day has not come when all the witnesses in a case can be subjected to such inquisitorial and deceptive tests (or to drugs like scopolamine, or to hypnosis) without their consent. Furthermore, such dramatics before the jury would distract them and impede the trial—this latter also because it is necessary for the inquisitor to ask both harmless, irrelevant and 'hot' questions in order to bring out the contrast in the witness' emotional responses. No doubt the lie-detector is useful in the investigation of crime, and may point to evidence which is competent; but it has no place in the court room." *Id.* at 193, 188 S.W.2d at 51.

If narcoanalytic techniques are developed to the stage where the results are reliable as "truth" there would be no necessity to test persons other than the principals. A test of them would usually provide a full and complete answer to the legal inquiry.

And in *State v. Lowry*, 163 Kan. 622, 627-8, 185 P.2d 147, 151 (1947), where the trial court had suggested that both the complaining witness and the defendant submit to a lie-detector, the Kansas Supreme Court indicated that it would be more reluctant to admit the test results on a witness than on a defendant:

"Consider the situation in the instant case. Two men were involved. One was a defendant on trial. The other was merely a witness and under no such emotional strain. Can it be said that with such wholly different mental states existing, the tests would be equally fair? Must the jury be asked to consider and weigh such intangible and elusive elements?"

ality structure, his "set" or attitude at that time, and the immediate stimuli impinging upon him. Generally, relaxation is facilitated, verbalization is less inhibited, and there is freer expression of fact—as well as of fancy and suggestion. In some cases correct information may be withheld or distorted and, in others, erroneous data elicited through suggestion. Nevertheless, narcoanalysis when correctly used may enable the psychiatrist to probe more deeply and quickly into the psychological characteristics of the subject. For these reasons, the results should not be regarded by the psychiatrist as "truth" but simply as clinical data to be integrated with and interpreted in the light of what is known concerning the dynamics of the subject's conflictual anxieties, motivations, and behavioral tendencies.

Thus the bare results of an interview under the influence of drugs should not, standing alone, be considered a valid and reliable indicator of the facts. As a sole procedure, narcoanalysis is not sufficiently reliable. And where the drug-induced interview is a primary procedure and an otherwise full examination of the subject's personality structure is lacking, the results should not be considered: *narcoanalysis should only be used as an adjunctive or auxiliary technique.* On the other hand, when the subject has submitted voluntarily, after advice of counsel, to a thorough examination by a psychiatrist of his own choosing, the psychiatrist should be permitted to take the results of a drug-induced interview into account as data in forming an opinion about the subject's mental con-

dition and personality structure. *So limited, the results have acquired enough reliability in the field of medical psychology to be recognized as bases for an expert opinion. And where the subject has submitted voluntarily there is no question of self-incrimination or the physician-patient privilege, and the hearsay rule is inapplicable.* [342]

Appendix "C"

C. T. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, WEST PUBLISHING CO. (1954), § 175, pp. 373-375 (FOOTNOTES OMITTED).

175. Statements Made While under the Influence of Drugs or Hypnosis.

Another possible method by which the truthfulness of the story of a witness may be tested is the inducing of a mental state in which his normal power of "censorship" is removed, and in which it becomes difficult or impossible for him to suppress his thoughts or devise a falsehood.¹ That alcohol has an influence in this direction is attested by the old maxim, *in vino veritas*. A physician administering the "twilight sleep" drug, scopolamine, to a woman in childbirth discovered that at a certain stage of anaesthesia the subject answered questions with child-like honesty.² Similar effects are produced by the injection of barbiturates, such as sodium amytal and sodium pentothal, which were widely used in World War II in the treatment of mental strains and neuroses produced by combat conditions. All of these drugs have been extensively employed in the investigation of crime and in the securing of confessions, and in attempts to test the guilt or innocence of convicts. If the drug were administered without the consent of the subject, it seems clear that a confession so induced would be excluded as "involuntary."³ If the subject consented to the use of the drug then the admissibility of the confession, it seems, would depend upon whether the judge found that he

had a reasonable capacity to understand and speak the truth when he confessed.⁴

It has been suggested that the best field of usefulness for the examination under narcosis is the clearing of innocent suspects.⁵ Defendants so far have offered such drug-induced statements without avail.⁶ Since this technique is even more clearly in the experimental stage than the lie-detector method, judicial notice of its validity could not be accorded. *If, however, a foundation should be laid by evidence of experts as to the validity of the method and as to its correct application in the particular instance so that in the opinion of the experts the power of conscious contriving was removed and the statements were not actuated by fantasy or suggestion*⁷—ever present dangers here—*such statements under voluntary narcosis could reasonably be admitted.* Even when offered by the party on his own behalf, the “hearsay” or “self-serving” objection need not prevail. *If the offering party has testified, the statement may be offered, not to prove the facts stated therein, but as a prior consistent statement to support his credibility, escaping the rule against such form of support by reason of the foundation showing the unique trustworthiness of this type of prior statement.* Or if the party has not testified, and the statement must come in as evidence of its truth, an exception to the hearsay rule on the ground of special trustworthiness could well be argued for. The further validation by experiment and practice, of the scientific theory of the trustworthiness of drug-induced statements, and the further de-

velopment of the skill of technicians in administering the method, will presumably be followed by the development of appropriate legal doctrines permitting the uses of such statements in evidence. (*Emphasis supplied.*)

There seems to be less scientific support for the reliability of declarations made under hypnotic influences than in the case of drug-induced statements.⁸ The hypnotic subject is, of course, ultra-suggestible, and this fact manifestly endangers the reliability of statements made under hypnosis. Thus far, the courts have rejected confessions induced by hypnosis,⁹ and statements made under hypnosis by the accused offered in his own behalf.¹⁰

Appendix "D"

TOPICAL ANALYSIS OF AUTHORITIES.

1. Those who label results of narcoanalysis or lie detectors as "self-serving" and exclude.

State v. Hudson, 289 S.W. 920 (Mo. 1926)

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

Peo. v. Cullen, 234 P.2d 1 (Sup.Ct.Cal. 1951)

(but cf: Peo. v. Jones, 266 P.2d 38)

State v. Lindemuth, 243 P.2d 325 (N.M. 1952)

2. Those in which concept of self-incrimination and invasion of right of privacy and doctor-patient relation dominate.

State v. Cole, 188 S.W.2d 43 (Mo. 1945)

Despres, Legal Aspects of Drug-Induced Statements, 14 U. of Chi. L.R. 601 (1947)

Muehlberger, Interrogation Under Drug Influence, 42 J. Crim. L., Crim. and Pol. Sci. 513 (1951)

3. Those in which foundation for scientific evidence was lacking.

State v. Hudson, 289 S.W. 920 (Mo. 1926)

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

4. Those in which evidence of results of narcoanalysis or lie detector was offered as substantive evidence of guilt or innocence of defendant.

State v. Hudson, 289 S.W. 920 (Mo. 1926)

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

Henderson v. State, 230 P.2d 495 (Okla. Crim. App. 1951)

State v. Lindemuth, 243 P.2d 325 (N.M. 1952)
 Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)

5. Those in which stipulation of parties would cure
 “unreliability” of the tests.

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
 Peo. v. Houser, 193 P.2d 937 (Cal. App. 1948)
 State v. Lowry, 185 P.2d 147 (Kans. 1947)
 LeFevre v. State, 8 N.W.2d 288 (Wisc. 1943)

6. Those in which court regards tests as “self-
 serving” substantive evidence of innocence.

State v. Hudson, 289 S.W. 920 (Mo. 1926)
 State v. Pusch, 46 N.W.2d 508 (N.D. 1950)
 Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
 State v. Lindemuth, 243 P.2d 325 (N.M. 1952)
 U. S. v. Bouchier, 5 USMCA 15, 17 CMR 15,
 20-24 (Ct. of Mil. App. 1954)

7. Those in which court would hold that psychia-
 trist should be permitted to introduce results of nar-
 coanalysis as part of expert psychiatric opinion of
 character.

Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)
 Peo. v. Ford, 107 N.E.2d 595 (N.Y. 1952)
 (dissent)
 U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)

8. Those which hold that refusal to admit evidence
 of narcoanalysis, if admissible, would not constitute
 error.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)
 Peo. v. Cullen, 234 P.2d 1 (Sup. Ct. Cal. 1951)
 (but cf: Peo. v. Jones, 266 P.2d 38)

9. Those who would admit results of narcoanalysis to show facts upon which expert psychiatric opinion is based.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)

Peo. v. Ford, 107 N.E.2d 595 (N.Y. 1952)

Peo. v. Esposito, 39 N.E.2d 925 (N.Y. 1942)

Rule 409, Model Code of Evidence, ALI (1942)

10. Those which admit psychiatric evidence concerning credibility of a witness.

U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)

See also 3 Wigmore, Evidence (3d ed. 1940),

§§ 924(a), 931, 932, 935, 997(b), 998(b)

Model Code of Evidence, ALI, Rules 106, 401, 409

11. Those which exclude results of narcoanalysis because of lack of precedent.

State v. Pusch, 46 N.W.2d 508 (N.D. 1950)

State v. Lindemuth, 243 P.2d 325 (N.M. 1952)

12. Those which permit comment that refusal to undergo narcoanalysis may be considered by a jury (cf: admission in State Courts of comment on failure of defendant to take stand)

Peo. v. Draper, 109 N.E.2d 342 (N.Y. 1952)

13. Those which indicate that admission of results of sodium pentothal would lie in sound discretion of trial court.

Peo. v. McCracken, 246 P.2d 913 (Cal. 1952)

14. Those in which results of narcoanalysis were not offered diligently or seasonably to the trial tribunal.

U. S. v. Bouchier, 5 USMCA 15, 17 CMR 15, 20-24 (Ct. of Mil. App. 1954)

15. Those in which transcript of defendant's statements made while under the influence of narcosis-producing drug clearly show self-contradictions and evasions to avoid incriminating details.

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

U. S. v. Bouchier, 5 USMCA 15, 17 CMR 15, 20-24 (Ct. of Mil. App. 1954)

16. Those which refuse to admit results of narcoanalysis as facts upon which expert based opinion because expert testified by means of the hypothetical question.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)

17. Those which refuse admission of "lie detector" results offered as substantive evidence of innocence because not yet reliable enough.

Frye v. U. S., 293 Fed. 1013 (C.D. Cir. 1923)

18. Those which refuse admission of results of "lie detector" offered as substantive evidence of innocence because defendant refused to take the stand or submit to a similar test by the prosecution.

State v. Bohner, 246 N.W. 314 (Wisc. 1933)

19. Those which refuse to permit rehabilitation of an impeached prosecution witness by asking him

whether or not he had taken a "lie detector" case because defendant could not cross-examine "lie detector" machine.

Kaminski v. State, 63 So.2d 339 (Fla. 1953)

[Criticized in 6 Stanford L. Rev. 172 (1953)]

20. Narcoanalysis is analogous to blood tests, psychiatric examinations for insanity and medical examinations generally, the results of which are not used for testimonial purposes.

8 Wigmore, Evidence (3d ed. 1940) § 2265

21. Narcoanalysis and full clinical psychiatric examination of a complaining witness in a sex case ought to be the imperative duty of the prosecutor to have conducted and results offered in evidence.

3 Wigmore, Evidence (3d ed. 1940) §§ 466, 924 (a), 934(a)

C. T. McCormick, Handbook of Law of Evidence, West Pub. Co. (1954) § 45, p. 99

22. Psychiatrist should be permitted to testify as to relevant character trait of witness or accused, especially in sex cases.

Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)

Strand v. State, 252 Par. 1030 (Wyo. 1927)

U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)

3 Wigmore, Evidence (3d ed. 1940) §§ 934(a), 977 et seq.

Peo. v. Cowles, 224 N.W. 387 (Mich. 1929)

State v. Wesler, 59 A.2d 834

Miller v. State, 295 Pac. 403 (Okla. Crim. 1930)

Rice v. State, 217 N.W. 697 (Wisc. 1928)
 cf: State v. Driver, 107 S.E. 189, 15 ALR 917
 (W.Va. 1921)
 59 Yale L. J. 1324, 1336-41 (1950)
 Drug-Induced Revelation, 62 Yale L. J. 315
 (1953)
 Psychiatric Aid in Evaluating Credibility of
 Rape Complainant, 26 Indiana L. J. 98 (1950)

23. Psychiatric testimony concerning character of witness or accused for relevant trait does not usurp province of the jury because jury can reject either the expert opinion or the grounds upon which the expert opinion is based.

2 Wigmore, Evidence (3d ed. 1940) §§ 673, 680

24. Properly identified magnetic recordings are generally recognized as admissible in evidence.

State v. Spencer, 258 P.2d 1147, 1152 (Sup. Ct. Ida. 1953)

Peo. v. Stephens, 256 P.2d 1033 (Cal. App. 1953)

Ray v. State, 57 So.2d 469 (Miss. 1952)

State v. Perkins, 198 S.W.2d 704, 168 ALR 920 (Mo. 1946)

Annotation, 168 ALR 927

Williams v. State, 226 P.2d 989, 994 (Okla. Cr. 1951)

Wright v. State, 79 So.2d 66 (Ala. 1955)

25. The use of involuntary narcoanalysis, especially upon an accused in a criminal case, would violate

the privilege against self-incrimination and the right of personal privacy.

Despres, Legal Aspects of Drug-Induced Statements, 14 U. of Chi. L.R. 601 (1947)

Matthews, Narcoanalysis for Criminal Interrogation, included in LEGAL MEDICINE by R. B. H. Gradwohl, The C. V. Mosby Co., St. Louis (1954) pp. 945-976

Saher, Narcoanalysis, International Bar Association, London Conference (1950)

26. Appellate Court in passing on alleged error in instruction will not, since the new Federal Rules of Criminal Procedure, take a strained and hyper-technical view.

Patterson v. U. S., 192 F.2d 631, Cert. den. 343 U.S. 951

27. The jury is entitled to know the facts upon which an expert psychiatric opinion or any expert opinion is based, in order to have a foundation for properly evaluating the weight, if any, to be given to the opinion, and this is especially true when hypothetical question is not used.

People v. Ford, 107 N.E.2d 595 (N.Y. 1952)

People v. Esposito, 39 N.E.2d 925 (N.Y. 1942)

Lindsey v. U. S., 133 F.2d 368 (D.C. Cir. 1942)

Gendelman v. U. S., 191 F.2d 993 (9th Cir. 1951), cert. den. 342 U.S. 909

U. S. v. Petrone, 195 F.2d 334 (2d Cir. 1950)

State v. Linders, 224 S.W.2d 386, 389 (Sup. Ct. Mo. 1949)

Wyatt v. State, 57 S.E.2d 914 (Sup. Ct. Ga. 1950)

People v. Penny, 281 P.2d 337 (Cal.App. 1955)
 Colvin v. State, 22 So.2d 544, 548 (Sup. Ct. Ala.
 1945)

Thornton v. Birmingham, 35 So.2d 545, 7 ALR
 2d 773 (Ala. 1948)

Walter v. State, 195 N.E. 268, 98 ALR 607
 (Ind. 1935)

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)
 3 Wigmore, Evidence (3d ed. 1940) §§ 445, 992,
 977

2 Wigmore, id., § 675

7 Wigmore, id., § 1922

Appendix "E"

PARTIAL ANALYSIS OF APPELLANT'S AUTHORITIES.

1. *State v. Lindemuth*, 243 P.2d 325 (N.M. 1952). 1952).

Defendant was convicted of murder. Prior to trial, defendant made several confessions which were admissible in evidence. At the trial, on his direct case, defendant offered the testimony of a psychiatrist who would testify that he had given the defendant a sodium pentothal test and that defendant while under the influence of the drug stated substantially the same narrative as he testified to on the stand to the effect that he had not killed the deceased victim. The trial court rejected this testimony and on appeal the New Mexico Supreme Court held that it was not error to refuse to admit the psychiatrist's testimony.

The appellate court did not regard the psychiatric testimony as sufficiently reliable to be admitted for the purpose of proving defendant's innocence. It is noteworthy that there is no showing that defendant was given a full clinical psychiatric examination. On the contrary, it is clear that the sodium pentothal test was relied upon as a sole procedure unaccompanied by any tests or facts which would tend to corroborate the results.

2. *State v. Lowry*, 195 P.2d 147 (Kans. 1947).

In this case defendant and complaining witness took lie detector tests given by a police captain. The captain was qualified as an expert, and gave his

opinion, not as to credibility of the witnesses, but as to answers to specific questions and interpretations of these answers bearing directly on the substantive issue of defendant's guilt or innocence.

The conviction was reversed on the grounds that the lie detector became a substantive witness in absentia, hence not subject to cross-examination by defendant, and that the expert gave direct substantive testimony on the ultimate issue, i.e., guilt of defendant.

Since the "ultimate issue" or "invasion of province of the jury" doctrines have been thoroughly exploded by Wigmore in 7 Wigmore, *Evidence* (3d ed. 1940), Sections 1920, 1921, and abandoned by the Model Code of Evidence, ALI, Rule 401 (1942), opinion really holds that the Court is unwilling to accept as substantive evidence of guilt, the interpretations of a mechanical lie detector. Here the results of the lie detector test were offered testimonially as direct evidence of guilt, and not merely as data in support of an expert opinion concerning the credibility of the subjects.

3. *Curtis v. Rives*, 123 F.2d 936 (D.C. Cir. 1941).

This case was cited by appellant but does not appear to be in point. In this case, defendant in a habeas corpus proceeding asserted that the United States Attorney did not call at the trial certain witnesses who had testified before the grand jury and that this resulted in a denial in his right to be confronted by witnesses against him. The Court of Appeals rejected this contention as being unmeritorious.

The United States attorney can call who he wants to in elaborating the theory of his case, but he does not have to call every witness who testified before the grand jury. If the prosecution had suppressed or concealed evidence, the Court indicated that it would have taken a different view, but the record clearly refuted such an allegation.

4. *Delaney v. U. S.*, 263 U.S. 586 (1924).

This case was cited by appellant but does not appear to be in point. In this case, appellant objected to testimony given by one conspirator concerning what another conspirator, who was dead, had told him during the progress of the conspiracy. The Supreme Court held this to be admissible hearsay and stated that:

“... it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. . . . We do not think that the discretion was abused in the present case . . .”

5. *U. S. v. Douglas*, 155 F.2d 894 (7th Cir. 1946).

This case also does not appear to be in point. In fact, if anything, it argues against the propriety of permitting Defendant's Exhibit “B” to go into the jury room as an exhibit.

In this case affidavits were attached to the information which contained proof of elements essential to conviction in order to persuade Court to grant leave to file the information. (This was the practice

before the Federal Rules of Criminal Procedure, 18 U.S.C.) These affidavits went to the jury room. One affidavit was made by a person called as a witness at the trial. The other was not. The Court of Appeals held that the introduction of these affidavits resulted in a deprivation of defendant's right to be confronted by the witnesses against him.

Appellant has overgeneralized the meaning of this case, just as he did *U. S. v. Sherman*, 171 F.2d 619 (2d Cir. 1948), because it is obvious that any evidence admissible as an exception to the hearsay rule would usually result in deprivation of confrontation. This would apply, for example, to use of prior inconsistent statements such as Defendant's Exhibit "B", as well as to prior consistent statements.

6. Appellant's statements concerning the article *Drug-Induced Revelation and Criminal Investigation*, 62 Yale L. J. 315 (1953), and his excerpts from that article are so conveniently overgeneralized and deftly taken out of context that appellee has included, as Appendix "B" of its brief, material taken from the article which approves of the use of narcoanalysis in the manner and for the purposes used in the case at bar.

7. Appellant's excerpts from McCormick, *Handbook of The Law of Evidence*, West Pub. Co. (1954), Section 175, page 374, is so unrepresentative of what Professor McCormick had to say about statements made while under the influence of drugs or hypnosis that appellee has quoted Section 175 in its entirety as Exhibit "C" of its brief.

8. Appellant has cited various annotations in American Law Reports, e.g., 60 ALR 1124 et seq., in support of his argument on corroboration of rape complainant; 140 ALR 21 et seq., in support of his argument against admissibility of prior consistent statement to rehabilitate an impeached witness; and 167 ALR 565 et seq., in support of his argument that attempt to show other similar offense was misconduct on part of United States attorney. In each of these annotations there was authority contra to the position urged by appellant, e.g., 60 ALR 1125 points out that corroboration of rape complainant is not required at common law or by majority of jurisdictions; 140 ALR 174 points out that prior consistent statements may be admissible to rehabilitate an impeached witness and in this area Courts have shown great liberality in sex cases in favor of such admission; 167 ALR 590 et seq. points out that other offenses may be brought out to show motive, identity, pattern or intent.

**United States Court of Appeals
For the Ninth Circuit**

ROLLAND LINDSEY, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, FIRST DIVISION

REPLY BRIEF OF APPELLANT

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INDEX

	<i>Page</i>
Reply Brief of Appellant.....	1
Conclusion	10
Appendix A — “Truth Serum” by John M. MacDonald	13

TABLE OF CASES

<i>Coulson v. United States</i> , 51 F.(2d) 178 (C.A. 10)....	9
<i>Kidwell v. United States</i> , 38 App. D.C. 566.....	10
<i>People v. Burns</i> (Ill.) 4 N.E.(2d) 26.....	8
<i>People v. Ford</i> , 107 N.E.(2d) 595.....	4, 5
<i>People v. Jones</i> (Cal.) 266 P.(2d) 38.....	4
<i>Shewitz v. United States</i> , 293 Fed. 581 (C.A. 6).....	8
<i>State v. Kenstler</i> (S.D.) 184 N.W. 259.....	8
<i>United States v. Hiss</i> , 88 F.Supp. 599.....	4, 5

TEXTBOOKS

Journal of Criminal Law, Criminology and Police Science, Vol. 46, No. 2 (1955), “Truth Serum” by John M. MacDonald.....	2, 13
III Wigmore on Evidence,	
§924, pp. 459-466	6
§§997, 998, pp. 639, 641, 642.....	6

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No. 14739

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REPLY BRIEF OF APPELLANT

Appellee candidly admits: (Br. 52) “. . . Without the medical testimony of Doctors Anderson and Stagg, the case would have been nothing more than Loretta’s word against appellant’s.” Dr. Stagg merely testified that an examination of the vagina of the prosecutrix disclosed habituation to sexual intercourse. This testimony is uncontradicted, but it does, of course, not prove appellant’s guilt. Dr. Anderson, the only practicing psychiatrist in the Territory of Alaska (R. 374) over objection was allowed to testify that a sodium pentothal test is highly reliable as a truth-eliciting device (R. 377); that it would force the prosecutrix to tell the truth (R. 382, 402); that the prosecutrix told a true story during the sodium pentothal interview (R. 400); and that she could not have made up her narration of the appellant’s conduct with her (Br. 401).

In the opening brief appellant challenged appellee to produce any legal or medical authorities substantiating Dr. Anderson’s opinion of the efficacy of sodium pentothal as a “truth serum.” *It will be noted that ap-*

[*Italics, wherever used in this brief, are ours. References Br. refer to appellee’s brief.*]

pellee has failed to produce a single medical or legal authority substantiating Dr. Anderson's view.

If instead of administering sodium pentothal to the prosecutrix, the psychiatrist had given her a few shots of bourbon sufficient to remove her inhibitions, it seems scarcely plausible that this court would sanction the admission of her testimony on the theory that she was bound to tell the truth while under the influence of alcohol. Lest this court feel that appellant's remarks are frivolous or facetious, we hasten to state that since the service of appellee's brief, there appeared an article in the July-August issue of the Journal of Criminal Law, Criminology and Police Science (Vol. 46, No. 2, 1955) "Truth Serum" by a well-known psychiatrist, John M. MacDonald, in which the learned author states (p. 259):

"... The intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject's speech may be no more reliable. The drugged person may be just as boastful and *untruthful* as the alcoholic..."

(p. 263) "... *As a test of truth, drug-induced examinations are unreliable* and should not be used for the purpose of exonerating the innocent..."

—and may we add by the same token, they should not be used for the purpose of rehabilitating impeached witnesses. Since the whole article demonstrates the unreliability of a sodium pentothal interview we have taken the liberty of reprinting it in full as the appendix (Appendix A).

Athough having been completely impeached by the

retraction made under oath and the admittedly false accusation of rape against the federal marshal, Dr. Anderson's testimony concerning the value of sodium pentothal as a truth-eliciting device,—though his opinion is at variance with the consensus of scientific opinion of his profession in the rest of the United States—we contend influenced the jury in believing that the prosecutrix was telling the truth.

Having read the cases cited and discussed by appellee, we submit that there is not one single case cited in which a psychiatrist has ever been permitted to render an opinion directly on the issue of the truth or falsity of a particular story of a witness, nor did we observe a decision where any court has ever sanctioned the playing to the jury of a verbatim recording of an interview of a psychiatrist and witness while the latter was under the influence of sodium pentothal. While psychiatrists are trained to observe insanity and various mental aberrations, they have no better facilities in finding out when normal people lie, than a court or a jury. All of us know of course that "normal" people do lie. If it is true that the prosecutrix in the instant case was neither neurotic nor a psychopathic personality, this court should not permit a pseudo-scientific opinion to sway the jury's mind. If the court will read the testimony elicited during the sodium pentothal interview, it can not fail to be impressed by the lack of scientific effort of Dr. Anderson. Dr. Anderson repeatedly stated that the prosecutrix could not have fabricated a story with such enormous detail of intimate knowledge of sexual matters. If we accept this premise, it would seem clear that a scientist would try to discover from whom and

with whom she acquired this knowledge. Yet, the interview discloses that not once did the doctor ask her about sexual relations with other men.

In his argument pertaining to the admissibility of Dr. Anderson's opinion and of the sodium pentothal interview, appellee relies principally upon three decisions:

People v. Jones, 266 P.(2d) 38;

U.S. v. Hiss, 88 F. Supp. 599; and the dissenting opinion in

People v. Ford, 107 N.E.(2d) 595.

It should be noted that in none of these cases was there even a discussion of the admission of a verbatim interview between a psychiatrist and a witness.

In the *Jones* case, *supra*, the Supreme Court of California granted the defendant a new trial because the trial court had refused to permit a psychiatrist to testify that the defendant was not a sexual deviate. The ruling of the California court can be understood only in the light of a California statute requiring expert testimony to determine whether a sex criminal is or is not a sexual deviate (p. 42). Furthermore in the opinion the court was careful to point out that the appellant in that case had not offered in testimony the answers given by him while under the influence of sodium pentothal. The court makes it clear that it would not have sanctioned the use of the answers given while under the influence of sodium pentothal (p. 43):

“Here, the proffered evidence was not the answers of Jones to certain questions, but the interrogator's expert analysis of those answers for the

purpose of determining whether Jones was a sexual deviate, that is, a sexual psychopath. The inference that Jones did not commit the offenses charged was to be drawn, if at all, from the psychiatrist's opinion in regard to the sexual propensities of Jones *and not from any answers given to him while under the influence of the drug . . .*''

The decision in the *Hiss* case, *supra*, likewise doesn't support appellee's contention here. In that case the trial court merely permitted a psychiatrist to render an opinion from his observations in court as to whether or not a witness was insane or mentally deranged. Sodium pentothal was not involved at all.

The dissenting opinion in the case of *People v. Ford*, *supra*, likewise does not support appellee's contention. The issue in that case was whether a psychiatrist could render an opinion as to the defendant's mental derangement which was partially based upon a sodium pentothal interview. The majority by its decision (no opinion of majority reported) makes it clear that the lower court had not erred in excluding testimony partially based upon the sodium pentothal interview. The dissenting judge was careful to point out that it would not have sanctioned the psychiatrist rendering an opinion on the ultimate issue in the case, *i.e.*, the guilt or innocence of the defendant. In the instant case the central issue was, of course, the truth or falsity of the accusations of the prosecutrix, and the vice of the trial court's ruling consists in the fact that it permitted Dr. Anderson to render his opinion concerning this central issue.

Appellee repeatedly cites Wigmore to buttress his position with reference to the admissibility of the psy-

chiatrist's opinion as to the truth of the story related by the prosecutrix and the admissibility of the verbatim recording of the sodium pentothal interview (Br. 18, 28, Appendix D, p. 28, 30, 33). Appellee thus tries to give the impression that this well-regarded author would have approved the rulings of the trial court in the instant case. Nothing could be further from the truth. If this court will check the references of appellee, it will find that the author was appalled by the fact that many innocent defendants had been the victims of false charges by psychopathic females in sex cases, and he therefore recommended psychiatric examinations of such females (III Wigmore on Evidence, § 924 at pp. 459-466). With reference to "truth serum" this author is careful to reserve his opinion as to its validity (III Wigmore on Evidence § 997, 998, pp. 639, 641, 642).

The court will note that appellee's arguments with reference to the admission of the sodium pentothal interview are completely inconsistent. At times appellant is careful to stress that this testimony was restricted merely to rehabilitate an impeached witness; *i.e.*, its truth value as substantive evidence would thus be rendered immaterial (Br. 16, 23, 24). However, in order to justify its admission as a prior consistent statement, appellee argues that the truth value of this testimony is guaranteed (Br. 27, 32). Instruction No. 8-A which is challenged displays the same inconsistency. In one portion of the instruction the court tells the jury that this testimony is not substantive evidence of the fact that the defendant committed the crimes with which he has been charged (R. 463) and in another portion the

of the instruction he advises the jury to accept the statements made by the prosecutrix while under the influence of sodium pentothal only if the drug made lying impossible or highly improbable (R. 462). Likewise in his final argument the United States District Attorney left no doubt that this testimony discovered "the truth" (R. 476, 518).

Appellee seeks to justify admission of this testimony on the ground that the witness had been charged with recent fabrication. When we read the interview, however, we find that Dr. Anderson was employed to destroy the effect of the written statement of the witness, which she gave under oath. Of course even a proper prior consistent statement would not have been admissible to overcome that type of impeachment.

It seems clear that at the time of the interview with the psychiatrist the witness had the same motive that she had previously had for leveling accusations against her father; *i.e.*, vengeance for alleged ill-treatment, and a desire to get away from parental control. In addition the witness then had the additional motive of fear that she might be charged with perjury, if she did not stick to her original story. These are sufficient reasons to render the interview incompetent as a prior consistent statement. When, in addition, it is shown that the test is unreliable, it is clear that the admission of this testimony cannot be supported by any legal theory.

On the issue of corroboration, appellee argues that most common law jurisdictions do not require it, if the evidence of the prosecutrix is clear and convincing (Br. 36, 37). Appellant agrees with this rule, but wishes

to point out that because of the impeachment of the prosecutrix corroboration should be required in the instant case. Appellee argues that the case of *People v. Burns*, 4 N.E.(2d) 26 (Ill. 1936, Br. 36), bears a striking similarity to the case at bar. A reading of the case shows that the testimony of the prosecutrix was corroborated by her brother who saw the defendant with the prosecutrix near the park where the crime was committed and in addition the father of the prosecutrix subsequently caught the defendant in the act of taking indecent liberties with his daughter. Such corroborative testimony is of course absent in this case.

Appellee argues that the trial court did not commit reversible error in restricting testimony of hostility between defendant and prosecutrix to 30 days preceding the date of first accusation. Appellee cites the case of *State v. Kenstler*, 184 N.W. 259 (S.D.). Reading this case the court will find that judgment of conviction of assault was reversed because the trial court had not permitted the defendant to show hostility for a period of two years preceding the assault.

To justify the striking of the testimony of the witnesses to the bad character of the prosecutrix, appellee relies on the case of *Shewitz v. U.S.*, 293 F. 581 (CCA 6th, Br. 40). Reading the decision this court will find that the facts are entirely dissimilar from those found here. In that case the character witness stated on several occasions that he didn't know anything about defendant's reputation. This is not the case here.

To justify his repeated attempts to introduce testimony of a collateral crime on the part of the appellant,

appellee relies on the case of *Coulson v. U.S.*, 51 F.(2d) 178 (CCA 10th) (Br. 45). However, a reading of this case discloses that judgment of conviction was reversed on the precise ground that the prosecutor had introduced evidence of a collateral crime. It should be clear that the inference of guilt to be deduced from a collateral unrelated crime is relatively slight. The unfairness to the defendant is manifest because he must defend against accusations when he is unprepared to do so. In addition the prejudicial effect upon the jury far outweighs the probative value of such testimony.

Appellee argues (Br. 46): “. . . The defendant was no more prejudiced by these abortive attempts to introduce evidence than Loretta Lindsey was by the introduction of improper reputation evidence.” Appellant is not aware that Loretta Lindsey was on trial for any crime. Perhaps this fact explains the absurdity of this argument.

Finally appellee attempts to demonstrate that the trial court's repeated comments to the effect that the retraction of the prosecutrix was the result of implied coercion was not prejudicial because the trial court was careful to point out that actual coercion had not been used to obtain the retraction. Appellant submits that the prejudicial effect upon him was equally disastrous as if the court had stated that the document was the result of actual coercion. The retraction, of course, constituted the central point of defense because it destroyed the credibility of the prosecutrix. The repeated unwarranted comments of the court that he considered the retraction the result of “implied coercion” necessarily destroyed the full effect of the impeachment.

CONCLUSION

Appellee has failed to adduce any authority supporting its position that a sodium pentothal interview is a reliable scientific tool to elicit "truth." It has further failed to show any precedent which would justify permitting a psychiatrist to render an opinion as to the truth or falsity of a particular story told by a witness who had been thoroughly impeached. It has failed to show any precedent permitting the verbatim reproduction of a sodium pentothal interview as a prior consistent statement or pursuant to any other theory of the law of evidence.

The requirement of corroboration in instances where the testimony of the prosecutrix has been impeached is reasonable. In the absence of an Alaska ruling on this point this court should follow the federal rule announced in the case of *Kidwell v. United States*, 38 App. D.C. 566. The trial court was incorrect in striking of the testimony of the bad reputation of the prosecutrix for truth and veracity. In the instant case the credibility of the prosecutrix was the crux of defendant's case and the striking of this testimony was highly prejudicial to appellant.

The repeated attempts of the District Attorney to bring before the jury by innuendo evidence of the commission of a collateral unrelated crime were highly prejudicial to appellant. The comments of the trial court intimating that the retraction signed and sworn to by the prosecutrix was the result of "implied coercion" was highly prejudicial to appellant.

Every one of the errors complained of singly would

warrant the granting of a new trial to appellant. The cumulative effect of all of the errors, it is submitted, makes it mandatory that appellant have a new trial.

Respectfully submitted,

PHILIP W. SCHOEL,

Attorney for Appellant.

MAX R. NICOLAI,

Of Counsel.

APPENDIX A

TRUTH SERUM

JOHN M. MACDONALD

John M. MacDonald, M.D., is Assistant Medical Director of the Colorado Psychopathic Hospital, University of Colorado Medical Center, Denver. This article is based upon experience he has gained as a state-employed psychiatrist and as a consulting psychiatrist to the District Courts of Colorado, and represents a comprehensive analysis of the value of truth serum in criminal investigation.—Editor.

Much publicity has been given to the use of drugs in obtaining confessions from suspected criminals. The terms "truth serum" suggests the existence of a drug with the remarkable property of eliciting the truth. *The reputation enjoyed by truth serum is based on spectacular newspaper reports rather than on carefully documented case reports in professional medical or legal journals.* The test is sometimes used by law enforcement officers, but it is doubtful whether it is as useful as popular belief would suggest. The description truth serum is misleading as the drug used is not a serum, and it does not always lead to the truth. Formerly scopalamine was used, but today a barbiturate drug, such as sodium amytal, is usually employed. The test may not be performed unless the suspect willingly gives his consent. The drug is injected slowly into a vein in order to induce a relaxed state of mind in which the suspect becomes more talkative and has less emotional control. *The mental state produced is not unlike that seen in acute alcoholism.*

It is well known that a person under the influence of alcohol may reveal information which he would not disclose when sober. Barbiturates are preferable to alcohol because results are obtained in a shorter time, under more uniform conditions which are easier to control and which are more conducive to satisfactory interrogation. *The intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject's speech may be no more reliable.* The drugged person may be just as boastful and untruthful as the alcoholic. The risk of self-incrimination is a potent force motivating the suspect against revealing information which might lead to his conviction on a criminal charge. It is unlikely that he will reveal information under drugs unless he is prepared to do so. *The test is by no means reliable,* and when used indiscriminately, it may cloud rather than clarify criminal investigation. It is important to be familiar with the limitations of this technique which is variously called truth serum test, narcosis, and narcoanalysis. The value of the test will be considered in regard to the innocent suspect, the guilty suspect, and the suspect who claims loss of memory.

The Innocent Suspect

It might be thought that no problems would arise from the use of drugs on persons who are, in fact, innocent. Unfortunately, persons under the influence of drugs are *very suggestible* and may confess to crimes which they have not committed. *False or misleading answers may be given, especially when questions are improperly phrased.* For example, if the police officer

asserted in a confident tone "You did steal the money, didn't you?", a suggestible suspect might easily give a false affirmative answer. Gerson and Victoroff reported the case of a soldier who, under sodium amytal narco-analysis, confessed to a robbery in which he had not participated. In 1928 in Hawaii, a murder suspect under the influence of drugs falsely confessed to writing the ransom note, but later the real murderer was discovered. False confessions under drugs may lead to a miscarriage of justice. A false confession may also interrupt the criminal investigation at a crucial time and enable the real criminal to escape detection. The test has been recommended as a valuable method of exonerating the innocent suspect, but the test is not sufficiently reliable for this purpose.

The Guilty Suspect

A confession made under the influence of drugs is inadmissible in evidence because of the rule against involuntary confessions. A confession obtained in this manner, however, may help the police to obtain further evidence which might lead to the criminal's conviction.

Occasionally, the mere suggestion of a truth serum test is sufficient to induce a confession. Some guilty suspects confess while under the influence of drugs. These confessions might appear to favor the use of truth serum tests. Experience shows that the criminal who confesses as the result of skillful interrogation without the use of drugs is the criminal who is likely to respond to examination while under narcosis. It should be emphasized that skillful interrogation requires considerable patience, effort, and psychological insight. The basis of competent criminal interrogation has been

well described by Inbau and Reid, who point out that a prime requisite for successful interrogation is persistence.

Never conclude an interrogation at the time when you feel discouraged and ready to give up, but continue for a little while longer—if only for five or ten minutes. The writers have observed many instances where the subject's resistance broke just at the very time when the interrogator himself was about ready to abandon his efforts.

Truth serum has been recommended as a means of last resort when other methods have failed. But one wonders how many successful truth serum tests have been employed, when the interrogator has become discouraged, just at that time when the suspect was about to confess. Inbau, who has had considerable experience in observing or participating in truth serum tests, is of the opinion that such tests are occasionally effective on persons who would have previously disclosed the truth anyway if they had been properly interrogated.

The suspect who is able to withstand competent and prolonged interrogation is usually able to withstand interrogation under narcosis. The confident criminal relishes the prospect of examination under drugs. He welcomes the opportunity of making self-serving statements in the pseudo-scientific atmosphere of the truth serum test. The only person likely to gain in these circumstances is the criminal who may strengthen the effectiveness of his denials in the eyes of a credulous jury. Some law enforcement officers have a mistaken faith in the reliability of the truth serum test. As a result, they may neglect to pursue their inquiries on a

suspect who emerges unscathed from this unreliable test of truth.

The Suspect Who Claims Loss of Memory

It is not infrequent for criminal suspects to claim loss of memory for the period during which the crime was committed. This amnesia is rarely genuine, and it is important to detect malingering. Genuine amnesia may result from insanity, epilepsy, and head injury, or it may occur as an hysterical symptom following severe psychological stress, as in Case 2 described below. Severe emotional trauma may or may not cause amnesia in first offenders who have committed a crime by accident, or in anger, without planning and not for the purpose of financial gains. The psychopath, the repeated offender, and the offender who commits a crime for financial gain is much less likely to have a genuine amnesia. The person who suffers from a genuine amnesia is unable to recall any events over a circumscribed period of time. The malingerer may show this pattern, but often he has a patchy amnesia which differs from genuine amnesia. A patchy amnesia is one in which remembered and forgotten events follow each other indiscriminately. An assumed amnesia is often exposed by some chance remark or written statement of the accused. Narcoanalysis is not likely to be of value and should not be employed in cases of malingering.

The person who fakes amnesia is usually able to continue the deception under narcosis, although he may choose to simulate a return of memory. Narcoanalysis provides suspects with a welcome and apparently honorable excuse for divulging, without "loss of face,"

what they claim to have forgotten. The skilled interrogator should be able to provide such a setting for confessions without resorting to the use of drugs. A criminal may choose to simulate a recovery of memory under drugs in order to form a basis for a plea of insanity. Thus, the test may help the criminal to circumvent justice. The following is a case in point:

Case 1. A twenty-nine-year-old white man was arrested in Denver while in possession of a stolen car. The trunk of the car was bloodstained and had an unpleasant odor of decomposing flesh. The owner of the car had been missing from his home in California for some weeks, and it was suspected that he had been murdered. The suspect claimed amnesia from the time he escaped from a California mental hospital two months previously until he found himself in a Denver hospital for treatment of a bullet wound received while trying to escape from the police.

He made several untruthful statements to the police. Prolonged questioning failed to reveal any significant information, although the detective captain thought that he was on the verge of making a statement. At this stage, he agreed to narcoanalysis. While under narcosis, he described his escape from the hospital and his subsequent meeting with the missing man. One evening he left this man in the car while he went to buy some food. On his return, he discovered the owner of the car with his head "bashed in." He was frightened that he would be blamed, as he had a criminal record. He drove to an isolated spot in New Mexico where he buried the body, which was later found in the location he he had described. He displayed little emotion and no remorse as he described these events. Indeed, he

was very self-possessed and appeared almost to enjoy the examination. In view of his previous untruthfulness and his behavior while under narcosis, it was considered that he was not suffering from a genuine amnesia. He later confessed to the crime and entered a plea of insanity which was subsequently rejected by the jury.

It is not considered that the use of drugs on this criminal served any useful purpose apart from extracting some information, partly true, partly false, which would probably have been obtained within a short time without drugs.

Narcoanalysis is of value in resolving a genuine loss of memory, as, for example, in the following case:

Case 2. A thirty-year-old white man was discovered in his apartment unconscious with knife wounds in his throat and abdomen. His wife had been murdered, death resulting from a cut throat. When the husband regained consciousness, he informed detectives that he could not remember anything that happened following an argument with his wife. He believed that someone must have wounded him and murdered his wife. Under sodium amytal, he recalled telling his wife that he was going to divorce her and obtain custody of the children, as she was neglecting them. His wife shouted that the boy was not his, but his brother's child, and the dispute became very heated. Suddenly his wife picked up a knife and stabbed him several times in the chest and abdomen. In the struggle, he obtained the knife and attacked his wife. He recalled thinking that he was mortally wounded and that his wife would probably escape punishment for his death. He decided to cut his own throat as he was in severe pain and as he

20

thought that he was dying anyway. The story was told with considerable release of emotion. Following the interview, the amnesia returned. The opinion that this suspect was suffering from a genuine amnesia was based on his behavior under narcosis and on the total psychiatric examination.

Conclusions

Truth serum has been overrated as an aid to criminal investigation. The criminal who is likely to confess under sodium amytal is likely to confess anyway if skillfully interrogated. The criminal who is able to withstand skilled interrogation is usually able to withstand examination while under the influence of drugs. The temptation to request a truth serum test as a short cut to the solution of a crime should be avoided. There is the danger in such a practice that narcoanalysis may be substituted for the painstaking, time-consuming inquiries which form the basis of competent police investigation. As Sir James Stephen stated in 1883, referring to a practice of police officers in India, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

The test is of value in restoring memory in cases of genuine amnesia. *As a test of truth, drug-induced examinations are unreliable* and should not be used for the purpose of exonerating the innocent. Criminal suspects, while under the influence of drugs, *may deliberately withhold information, persist in giving untruthful answers, or falsely confess to crimes they have not committed.*

No. 14740

United States
Court of Appeals
for the Ninth Circuit

RUTH STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CY STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILE

OCT 20 1955

PAUL P. O'BRIEN, CLERK

No. 14740

United States
Court of Appeals
for the Ninth Circuit

RUTH STERNS,	Petitioner,
vs.	
COMMISSIONER OF INTERNAL REVENUE,	Respondent.
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Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

Petitions for Review:

No. 37940	41
No. 37941	44

Replies to Answers to Petitions for Redetermination of Deficiency:

No. 37940	15
No. 37941	30

Statement of Points and Designation of Record (Appellants-USCA)	366
--	-----

Transcript of Proceedings and Testimony.....	49
--	----

Opening Statement on Behalf of the Petition- ers by Mr. Reed.....	51
--	----

Opening Statement on Behalf of the Re- spondent by Mr. Burrell.....	53
--	----

Witnesses:

Cummins, O. E.

—direct	241
—cross	285
—redirect	297

McClain, Robert E.

—direct	226
—cross	231
—redirect	238

Radke, Ray

—direct	192
—recalled, direct (By the Court)...	299
—cross	307

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Randolph, John H.

—direct 214

—cross 221

Ross, Oscar S.

—direct 167

—cross 175

Smith, Luther J.

—direct 202

—cross 209

Sterns, Cyrus

—direct 56, 109

—cross 110

—redirect 152

—recalled, direct..... 157, 181, 200, 327

—cross 160, 350

—redirect 357

—recross 360

Sutterman, Leonard

—direct 163

Syracuse, Edward Anthony

—direct 184

NAMES AND ADDRESSES OF COUNSEL

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Tax Department, Department of Justice,
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Chief Counsel,

ROLLIN H. TRANSUE,
Special Attorney,
Internal Revenue Service,
Washington 25, D. C.,
Counsel for Respondents.

The Tax Court of the United States

Docket No. 37940

RUTH STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named Petitioner hereby Petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:99D:CTF) dated September 21, 1951, and as a basis of this proceeding, alleges as follows:

1. The Petitioner is an individual with residence at 126 Stonehaven Way, Los Angeles, California. The returns for the periods here involved, were filed with the Commissioner for the 6th District of California at Los Angeles, California.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the Petitioner on September 21, 1951.

3. The deficiencies and penalties, as determined by the Commissioner, all of which are in controversy, are as follows:

Year		Deficiency	50% Penalty
1943	Income and victory tax.....	\$51,923.66	\$25,961.83
1944	Income tax	18,970.12	9,485.06
Total.....		\$70,893.78	\$35,446.89

4. The determination of tax set forth in the said

notice of deficiencies is based upon the following errors:

(a) The Commissioner erred in determining that the net income from the business of Petitioners husband for the taxable year 1943, was \$160,492.21, and in increasing Petitioners income by the community half or \$80,246.10.

(b) The Commissioner erred in failing to determine that Petitioner's husband incurred a net loss from the operation of his business for the taxable year 1943 in the amount of \$8,788.28, and that Petitioners community half of said loss was \$4,394.14.

(c) The Commissioner erred in determining that the net income from the business of the Petitioner's husband for the taxable year 1944 was \$75,615.24 and that Petitioners community half was \$37,807.62.

(d) The Commissioner erred in failing to determine that Petitioner's husband incurred a loss in the operation of his business for the taxable year 1944 in the amount of \$64,578.45 and that Petitioners community half was \$32,293.72.

(e) The Commissioner erred in failing to determine that Petitioner is entitled to a carry-back of her community half of said operating loss of \$32,293.72 in computing her net income for 1943.

(f) The Commissioner erred in asserting a penalty of 50% in the amount of \$25,961.83 for the year 1943 and \$9,485.06 for the year 1944, or a penalty in any amount.

5. The facts upon which Petitioner relies as the basis of this proceeding are as follows:

(a) During the taxable years, the Petitioner's

husband was engaged in the business of brokerage of liquor wholesale. The business consisted of buying liquor from rectifiers and distillers through the South Pacific Wholesale Company of 7358 $\frac{1}{2}$ Beverly Blvd., Los Angeles, California. The liquor was delivered to and billed to said South Pacific Wholesale Company. Petitioner's husband solicited orders from customers and turned said orders over to South Pacific Wholesale Company, which filled the orders. All expenses of handling were paid by Petitioner's husband and the South Pacific Wholesale Company received \$2.00 per case as handling fee.

(b) During the year 1943, Petitioner's husband sold liquor through the South Pacific Wholesale Company in the amount of \$172,016.56. The cost of the goods sold was \$144,026.96. The gross profit was \$27,989.60. Operating expenses totaled \$36,777.88. For the taxable year 1943, Petitioner's husband incurred a net loss of \$8,788.28.

(c) Petitioners community half of said loss was \$4,394.14.

(d) For the taxable year 1944, Petitioner's husband sold liquor through the South Pacific Wholesale Company in the amount of \$249,974.09. The cost of the goods sold was \$203,805.52. The gross profit was \$46,168.57. Operating expenses totaled \$110,756.02. The Petitioner's husband incurred a loss for the taxable year 1944 in the sum of \$64,578.45.

(e) Petitioners community half of said loss was \$32,298.72.

6. The Petitioner is entitled to a carry-back of the net operating losses under the provisions of the Internal Revenue Code.

7. The Petitioner overpaid her income tax for the taxable year 1943 in the amount of \$196.48.

8. The petitioner paid the sum of \$196.48 on March 15, 1944.

9. Prior to March 15, 1947, Petitioner and Respondent executed an agreement extending beyond the time described in Sec. 275 of the Internal Revenue Code, the time within which the Respondent might assess the tax. Such time was subsequently extended by agreement to June 30, 1952.

Wherefore, Petitioner prays that this Court may hear this proceeding and redetermine that there is no deficiency in income tax or penalties due from this Petitioner for the taxable years 1943 and 1944; and that the Petitioner has overpaid her income tax for the year 1943 in the amount of \$196.48, and that said amount was paid within three years before the execution of the agreement by Petitioner and the Commissioner extending the period of assessment of the tax to June 30, 1952; and for such other further relief as Petitioner may be entitled under the law.

/s/ SIDNEY R. REED,
/s/ CHARLES J. MUNZ, JR.,
/s/ EDWARD D. FRENCH,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, California.

LA:IT:99D:CTF

September 21, 1951

Mrs. Ruth Sterns
126 Stonehaven Way
Los Angeles 49, California

Dear Mrs. Sterns:

You are advised that the determination of your income tax and victory tax liability for the taxable year ended December 31, 1943 discloses a deficiency of \$51,923.66, and \$25,961.83 in penalty, and that the determination of your income tax liability for the taxable year ended December 31, 1944 discloses a deficiency of \$18,970.12, and \$9,485.06, in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los

Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner

Enclosures: Statement, Form of waiver.

Statement

Tax Liability for the Taxable Years Ended December 31, 1943 and 1944

Year	Deficiency	50% Penalty
1943 Income and victory tax.....	\$51,923.66	\$25,961.83
1944 Income tax	18,970.12	9,485.06
Total.....	<u>\$70,893.78</u>	<u>\$35,446.89</u>

In making this determination of your income and victory tax and penalty liability careful consideration has been given to the report of examination dated October 27, 1948, to your protest dated August 14, 1950, and to the statements made at the conferences held.

The 50 per cent penalty shown herein is asserted in accordance with the provisions of section 293(b) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$ 1,005.63	\$ 1,005.63
Additional income:		
(a) Business income	80,246.11	80,246.11
Total	<u>\$81,251.74</u>	<u>\$81,251.74</u>
Decrease in income and allowable deductions:		
(b) Salaries decreased	\$ 502.82	\$ 502.82
(c) Contributions allowed	37.50	.....
(d) Taxes allowed	78.20	.....
(e) Losses allowed	87.20	.....
Total	<u>\$ 705.72</u>	<u>\$ 502.82</u>
Net income adjusted.....	\$80,546.02	\$80,748.92

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your husband's net income from business for the taxable year 1943 is \$160,492.21, your community half of which, \$80,246.10, was not reported in your return.

(b) The salary income reported in your return of \$1,005.63 is decreased by the amount of \$502.82, representing the community half reportable in computing your husband's net income.

(c), (d), and (e) You are allowed deductions for contributions in the amount of \$37.50, taxes of \$78.20, and losses of \$87.20 representing the community half of deductions claimed by your husband.

COMPUTATION OF INCOME AND VICTORY TAX

Taxable Year Ended December 31, 1943

Income Tax net income adjusted.....	\$80,546.02
Less: Personal exemption	500.00
Surtax net income.....	<u>\$79,946.02</u>
Less: Earned income credit	1,400.00
Income subject to normal tax.....	<u>\$78,546.02</u>

Normal tax at 6 per cent on \$78,546.02.....	\$ 4,712.76
Surtax on \$79,946.02	43,901.13
<hr/>	
Total income tax	\$48,613.89
Net income tax	\$48,613.89
Victory tax net income adjusted.....	\$80,748.92
Less: Specific exemption	624.00
<hr/>	
Income subject to victory tax.....	\$80,124.92
Victory tax before credit (5% of \$80,124.92)	\$ 4,006.25
Less: Victory tax credit—limited to.....	500.00
<hr/>	
Net victory tax	3,506.25
<hr/>	
Net income tax and victory tax.....	\$52,120.14
Income tax for 1942.....	\$ None
Correct income and victory tax liability.....	\$52,120.14
Income and victory tax liability shown on return, account No. 8149228	196.48
<hr/>	
Deficiency of income and victory tax.....	\$51,923.66
50% penalty	\$25,961.83

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....	\$ 348.15
Additional income:	
(a) Business income	37,807.62
<hr/>	
Total	\$38,155.77
Allowable deduction:	
(b) Casualty loss	435.00
<hr/>	
Net income adjusted.....	\$37,720.77

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your husband's net income from business for the taxable year 1944 is \$75,615.24, your community half of which, \$37,807.62, was not reported in your return.

(b) You are allowed a deduction for a casualty loss in the amount of \$435.00, representing the community half of the loss claimed by your husband.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1944

Net income adjusted	\$37,720.77	
Less: Surtax exemption	500.00	
Surtax net income.....	\$37,220.77	
Surtax		\$17,853.50
Net income adjusted.....	\$37,720.77	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax.....	\$37,220.77	
Normal tax at 3%.....		1,116.62
Correct income tax liability.....	\$18,970.12	
Income tax liability shown on return, account No. 79560628		None
Deficiency of income tax.....	\$18,970.12	
50% penalty		\$ 9,485.06

[Endorsed]: T.C.U.S. Filed December 12, 1951.

[Title of Tax Court and Cause No. 37940.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the deficiencies and penalties as determined by the Commissioner are in the amounts set forth in paragraph 3 of the petition, but denies that the full amounts are in controversy.

4. (a) to (f) inclusive. Denies the allegations of error contained in subparagraphs (a) to (f) inclusive, of paragraph 4 of the petition.

5. (a). Admits that during the taxable years the petitioner's husband was engaged in the wholesale liquor business, buying liquor from rectifiers and distillers and selling it to customers on orders which he solicited from said customers. The liquor which petitioner's husband purchased and sold was handled for him by South Pacific Wholesale Company, which accepted delivery of the liquor and filled the orders obtained by petitioner's husband in return for a handling fee paid by him to said company. Denies the remaining allegations of subparagraph (a) of paragraph 5 of the petition.

(b) Admits that during the year 1943 petitioner's husband sold liquor through the South Pacific Wholesale Company, but denies that the amounts of gross sales, cost of goods sold, gross profit and operating expenses, as alleged, are correct. Denies that petitioner's husband incurred a net loss for the taxable year 1943.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits that during the taxable year 1944, petitioner's husband sold liquor through the South Pacific Wholesale Company, but denies that the

amount of gross sales, cost of goods sold, gross profit and general operating expenses, as alleged, are correct. Denies that petitioner's husband incurred a loss for the taxable year 1944.

(e). Denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

6, 7 and 8. Denies the allegations contained in paragraphs 6, 7 and 8 of the petition.

9. Admits the allegations contained in paragraph 9 of the petition.

10. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

For further answer to the petition herein, respondent alleges:

11. That the income tax returns filed by the petitioner for the taxable years 1943 and 1944 reported net income and taxes due in the following amounts:

1943: Reported Victory Tax Net Income, \$1,005.63; Reported Income Tax Net Income, \$1,005.63.

1944: Reported Income Tax Net Income, \$348.15.

1943: Reported Victory and Income Taxes Due, \$196.48.

1944: Reported Income Taxes Due, None.

12. That during the years 1943 and 1944 petitioner's husband was in the business of buying and selling liquor, receiving large amounts of net income from said business and petitioner knowingly and fraudulently failed and refused to report, acknowledge or disclose the receipt of said additional

amounts of income, taxes due thereon and all facts and information regarding the receipt of said additional amounts of income, which said additional amounts of income are set forth in the deficiency notice, a copy of which is attached to the petition, and made a part hereof by reference; which said amounts of additional income resulted in the following corrected, adjusted net income and liability:

1943: Correct Adjusted Victory Tax Net Income, \$80,748.92; Correct Adjusted Income Tax Net Income, \$80,546.02; Correct Income and Victory Tax Liability, \$52,120.14.

1944: Correct Adjusted Income Tax Net Income, \$37,720.77; Correct Income Tax Liability, \$18,970.12.

13. That, accordingly, there are due, and there are hereby claimed from the petitioner for the years 1943 and 1944 the deficiencies and penalties as set forth in the notice of deficiency and below:

1943: Deficiency of Income and Victory Tax, \$51,923.66; 50% Penalty, \$25,961.83.

1944: Deficiency of Income Tax, \$18,970.12; 50% Penalty, \$9,485.06.

14. That the said income tax returns for 1943 and 1944 which were filed by petitioner are false and fraudulent and were prepared and filed with intent to evade tax, and therefore, the said deficiencies for the years 1943 and 1944 are due to fraud with intent to evade the true and correct taxes due from the petitioner for said taxable years.

Wherefore, respondent prays that the Court determine the deficiencies and penalties involved here-

in to be the amounts determined by the Commissioner.

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel,
R. E. Maiden, Jr., W. P. Flynn, Jr., Special
Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed February 8, 1952.

[Title of Tax Court and Cause No. 37940.]

REPLY

The petitioner by her counsel, Sidney R. Reed, Charles J. Munz, Jr., and Edward D. French, for reply to the allegations affirmatively set out by the respondent in his answer, admits and denies as follows:

11. Admits the allegations contained in paragraph 11. of the answer.

12. Admits that during the years 1943 and 1944 petitioner's husband was in the business of buying and selling liquor. Denies the remaining allegations contained in paragraph 12. of the answer.

13. Denies the allegations contained in paragraph 13. of the answer.

14. Denies the allegations contained in paragraph 14. of the answer.

15. Denies each and every allegation contained

in the answer not hereinbefore specifically admitted, qualified or denied.

Wherefore, petitioner prays that the deficiencies and penalties requested by the respondent in his answer be denied.

/s/ SIDNEY R. REED,
/s/ CHARLES J. MUNZ, JR.,
/s/ EDWARD D. FRENCH,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed March 20, 1952.

The Tax Court of the United States

Docket No. 37941

CY STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:CTF) dated September 21, 1951, and as a basis of this proceeding, alleges as follows:

1. The Petitioner is an individual with residence at 126 Stonehaven Way, Los Angeles, California. The returns for the periods here involved, were filed with the Commissioner for the 6th District of California at Los Angeles, California.

2. The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the Petitioner on September 21, 1951.

3. The deficiencies and penalties, as determined by the Commissioner, all of which are in controversy, are as follows:

Year	Deficiency	50% Penalty
1943 Income and victory tax.....	\$49,747.91	\$24,873.96
1944 Income tax	18,733.38	9,366.69
Total.....	\$68,481.29	\$34,240.65

4. The determination of tax set forth in the said notice of deficiencies is based upon the following errors:

(a) The Commissioner erred in determining that the net income from Petitioners business for the taxable year 1943, was \$160,492.21, and in increasing Petitioners income by the community half or \$80,-246.10.

(b) The Commissioner erred in failing to determine that Petitioner incurred a net loss from the operation of his business for the taxable year 1943 in the amount of \$8,788.28, and that Petitioners community half of said loss was \$4,394.14.

(c) The Commissioner erred in determining that the net income from the business of the Petitioner for the Taxable year 1944 was \$75,615.24 and that Petitioners community half is \$37,807.62.

(d) The Commissioner erred in failing to determine that Petitioner incurred a loss in the operation of his business for the taxable year 1944.

(e) The Commissioner erred in failing to deter-

mine that Petitioner incurred a loss in the operation of his business for the taxable year 1944 in the amount of \$64,578.45.

(f) The Commissioner erred in failing to determine that Petitioner is entitled to a carry-back of his community half of said operating loss of \$32,293.72 in computing his net income for 1943.

(g) The Commissioner erred in disallowing the amount of \$1,440.59 of the sum of \$2,881.18 reported as a net loss from Commissions for the taxable year 1944.

(h) The Commissioner erred in disallowing contributions to charities in the amount of \$100.00 for the year 1944.

(i) The Commissioner erred in disallowing deductions for taxes in the amount of \$138.60 for the year 1944.

(j) The Commissioner erred in disallowing medical expenses in the amount of \$1,575.00.

(k) The Commissioner erred in failing to credit Petitioner with, or to refund the payment of the sum of \$1,050.00 paid by him in 1944 as his estimated tax for that year.

(l) The Commissioner erred in asserting a penalty of 50% in the amount of \$24,873.96 for the year 1943 and \$9,366.69 for the year 1944, or a penalty in any amount.

5. The facts upon which Petitioner relies as the basis of this proceeding are as follows:

(a) During the taxable years, the Petitioner was engaged in the business of brokerage of liquor wholesale. The business consisted of buying liquor

from rectifiers and distillers through the South Pacific Wholesale Company of 7358½ Beverly Blvd., Los Angeles, California. The liquor was delivered to and billed to said South Pacific Wholesale Company. Petitioners solicited orders from customers and turned said orders over to South Pacific Wholesale Company, which filled the orders. All expenses of handling were paid by Petitioner and the South Pacific Wholesale Company received \$2.00 per case as handling fee.

(b) During the year 1943, Petitioner sold liquor through the South Pacific Wholesale Company in the amount of \$172,016.56. Petitioners cost of goods sold, was \$144,026.96. The gross profit was \$27,989.60. Operating expenses totaled \$36,777.88. For the taxable year 1943, Petitioner incurred a net loss of \$8,788.28.

(c) Petitioners community half of said loss is \$4,394.14.

(d) For the taxable year 1944, Petitioner sold liquor through the South Pacific Wholesale Company in the amount of \$249,974.09. The cost of the goods sold was \$203,805.52. The gross profit was \$46,168.57. The general operating expenses was \$110,756.02. The Petitioner incurred a loss for the taxable year 1944 in the sum of \$64,587.45.

(e) Petitioners community half of said loss is \$32,298.72.

(f) The Petitioner is entitled to a carry-back of the net operating losses under the provisions of the Internal Revenue Code.

(g) Petitioner made donations amounting to

\$100.00 to various charitable organizations during the year 1944.

(h) Petitioner paid California automobile license in the amount of \$13.60 and sales tax in the amount of \$125.00 in the year 1944.

(i) Petitioners medical expenses paid in the year 1944 were \$1,575.00.

(6) The Petitioner overpaid his income tax for the taxable year 1943 in the amount of \$2,372.23.

7. The Petitioner paid the sum of \$2,372.26 on March 15, 1944.

8. The Petitioner paid the sum of \$1,050.00 during 1944 as his estimated income tax liability for that year, no part of which has been refunded to petitioner.

9. Prior to March 15, 1947, Petitioner and Respondent executed an agreement extending beyond the time described in Sec. 275 of the Internal Revenue Code, the time within which the Respondent might assess the tax. Such time was subsequently extended by agreement to June 30, 1952.

Wherefore, Petitioner prays that this Court may hear this proceeding and redetermine that there is no deficiency in income tax or penalties due from this Petitioner for the taxable years 1943 and 1944; and that the Petitioner has overpaid his income tax for the year 1943 in the amount of \$2,372.23 and \$1,050.00 for the year 1944; and that said amounts were paid within three years before the execution of the agreement by Petitioner and the Commissioner extending the period of assessment of the

tax to June 30, 1952; and for such other further relief as Petitioner may be entitled under the law.

/s/ SIDNEY R. REED,
/s/ CHARLES J. MUNZ, JR.,
/s/ EDWARD D. FRENCH,
Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, California.

LA:IT:90D:CTF

September 21, 1951

Mr. Cy Sterns
126 Stonehaven Way
Los Angeles 49, California

Dear Mr Sterns:

You are advised that the determination of your income tax and victory tax liability for the taxable year ended December 31, 1943 discloses a deficiency of \$49,747.91, and \$24,873.96 in penalty, and that the determination of your income tax liability for the taxable year ended December 31, 1944 discloses a deficiency of \$18,733.38, and \$9,366.69 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as

the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner

Enclosures: Statement, Form of waiver.

Statement

Tax Liability for the Taxable Years Ended December 31, 1943 and 1944

Year	Deficiency	50% Penalty
1943 Income and victory tax.....	\$49,747.91	\$24,873.96
1944 Income tax	18,733.38	9,366.69
Total.....	\$68,481.29	\$34,240.65

In making this determination of your income and victory tax and penalty liability careful consideration has been given to the report of examination

dated October 27, 1948, to your protest dated August 14, 1950, to the statements made at the conferences held, to your amended return for 1943 filed on June 21, 1945, and to your second return for 1944 filed on June 21, 1945.

The 50 per cent penalty shown herein is asserted in accordance with the provisions of section 293(b) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$ 9,798.81	\$10,204.61
Additional income and unallowable deductions:		
(a) Business income	80,246.10	80,246.10
(b) Contributions decreased	37.50	.....
(c) Taxes decreased	78.20	.....
(d) Losses decreased	87.20	.....
Total	\$90,247.81	\$90,450.71
Decrease in income:		
(e) Salaries decreased	9,701.79	9,701.79
Net income adjusted.....	\$80,546.02	\$80,748.92

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your net income from business for the taxable year 1943 was \$160,492.21 which was not reported in your return. Your community half of this increase to the net income reported in your return is \$80,246.10.

(b), (c), and (d) The deductions claimed for contributions in the amount of \$75.00, taxes of \$156.40 and losses of \$174.40 are disallowed to the extent of \$37.50, \$78.20, and \$87.20, respectively, representing the community half of these items allowable as deductions in computing the net income of your wife.

(e) The salary income of \$10,204.61 reported in your return is decreased by the amount of \$9,701.79, computed as shown below:

(1) Net salary reported in your return eliminated.....	\$ 10,204.61
Your community half of compensation of \$1,005.63 reported in your wife's return.....	502.82
Adjustment	\$ 9,701.79

(1) The salary reported in your return is eliminated since it is reflected in adjustment (a) above.

COMPUTATION OF INCOME AND VICTORY TAX

Taxable Year Ended December 31, 1943

Income tax net income adjusted.....	\$ 80,546.02
Less: Personal exemption	600.00
Surtax net income.....	\$ 79,946.02
Less: Earned income credit.....	1,400.00
Income subject to normal tax.....	\$ 78,546.02
Normal tax at 6 per cent on \$78,546.02....	\$ 4,712.76
Surtax on \$79,946.02	43,901.13
Total income tax.....	\$ 48,613.89
Net income tax	\$ 48,613.89
Victory tax net income adjusted.....	\$80,748.92
Less: Specific exemption	624.00
Income subject to victory tax.....	\$80,124.92
Victory tax before credit (5% of \$80,124.92)	4,006.25
Less: Victory tax credit—limited to.....	500.00
Net victory tax	3,506.25
Net income tax and victory tax.....	\$ 52,120.14
Income tax for 1942	None
Correct income and victory tax liability.....	\$ 52,120.14
Income and victory tax liability shown on return, account No. 924367	2,372.23
Deficiency of income and victory tax.....	\$ 49,747.91
50% penalty	\$ 24,873.96

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1944

Net income as disclosed by return (loss).....(\$ 4,124.27)

Additional income and unallowable deductions:

(a) Business income	37,807.62
(b) Net loss from commissions eliminated.....	1,440.59
(c) Contributions disallowed	100.00
(d) Taxes disallowed	138.60
(e) Casualty loss decreased.....	435.00
(f) Medical expenses disallowed.....	1,575.08

 Net income adjusted.....\$ 37,372.62

EXPLANATION OF ADJUSTMENTS

(a) It has been determined that your net income from business for the taxable year 1944 was \$75,615.24 which was not reported in your return. Your community half of this income is \$37,807.62.

(b) The net loss from commissions reported in the amount of \$2,881.18 and included in your return in the amount of \$1,440.59 is eliminated since this item is reflected in business income.

(c) and (d) The deductions claimed for contributions and taxes are disallowed due to lack of substantiation.

(e) The deduction claimed in the amount of \$870.00 as a casualty loss is decreased in the amount of \$435.00, representing the community half allowable as a deduction by your wife.

(f) The deduction claimed for medical expenses is disallowed since the total medical expenses do not exceed five per cent of your adjusted gross income as determined. Section 23 (x), I.R.C.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1944

Net income adjusted.....\$37,372.62

Less: Surtax exemption..... 500.00

 Surtax net income.....\$36,872.62

Surtax \$ 17,627.20

Net income adjusted.....\$37,372.62

Less: Normal-tax exemption..... 500.00

 Net income subject to normal tax.....\$36,872.62

Normal tax at 3%.....	\$ 1,106.18
Correct income tax liability.....	\$ 18,733.38
Income tax liability shown on return, account No. 9020346	None
Deficiency of income tax.....	\$ 18,733.38
50% penalty	\$ 9,366.69

[Endorsed]: T.C.U.S. Filed December 12, 1951.

[Title of Tax Court and Cause No. 37941.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the deficiencies and penalties as determined by the Commissioner are in the amounts set forth in paragraph 3 of the petition, but denies that the full amounts are in controversy.

4. (a) to (l) inclusive. Denies the allegations of error contained in subparagraphs (a) to (l) inclusive, of paragraph 4 of the petition.

5. (a). Admits that during the taxable years the petitioner was engaged in the wholesale liquor business, buying liquor from rectifiers and distillers and selling it to customers on orders which he so-

licited from said customers. The liquor which petitioner purchased and sold was handled for him by South Pacific Wholesale Company, which accepted delivery of the liquor and filled the orders obtained by petitioner in return for a handling fee paid by him to said company. Denies the remaining allegations of subparagraph (a) of paragraph 5 of the petition.

(b) Admits that during the year 1943 petitioner sold liquor through the South Pacific Wholesale Company, but denies that the amounts of gross sales, cost of goods sold, gross profit and operating expenses, as alleged, are correct. Denies that petitioner incurred a net loss for the taxable year 1943.

(c) Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits that during the taxable year 1944, petitioner sold liquor through the South Pacific Wholesale Company, but denies that the amount of gross sales, cost of goods sold, gross profit and general operating expenses, as alleged, are correct. Denies that petitioner incurred a loss for the taxable year 1944.

(e) to (i) inclusive. Denies the allegations contained in subparagraphs (e) to (i) inclusive, of paragraph 5 of the petition.

6, 7 and 8. Denies the allegations contained in paragraphs 6, 7 and 8 of the petition.

9. Admits the allegations contained in paragraph 9 of the petition.

10. Denies each and every allegation contained

in the petition not hereinbefore specifically admitted, qualified or denied.

For further answer to the petition herein, respondent alleges:

11. That the income tax returns filed by the petitioner for the taxable years 1943 and 1944 reported net income and taxes due in the following amounts:

1943: Reported Victory Tax Net Income, \$10,-204.62; Reported Income Tax Net Income, \$9,-798.81.

1944: Reported Income Tax Net Income, (\$4,-124.27) (Loss).

1943: Reported Victory and Income Taxes Due, \$2,372.23.

1944: Reported Income Taxes Due, None.

12. That during the years 1943 and 1944 petitioner was in the business of buying and selling liquor, receiving large amounts of net income from said business and he knowingly and fraudulently failed and refused to report, acknowledge or disclose the receipt of said additional amounts of income, taxes due thereon and all facts and information regarding the receipt of said additional amounts of income, which said additional amounts of income are set forth in the deficiency notice, a copy of which is attached to the petition, and made a part hereof by reference; which said amounts of additional income resulted in the following corrected, adjusted net income and tax liability:

1943: Correct Adjusted Victory Tax Net Income, \$80,748.92; Correct Adjusted Income Tax Net In-

come, \$80,546.02; Correct Income and Victory Tax Liability, \$52,120.14.

1944: Correct Adjusted Income Tax Net Income, \$37,372.62; Correct Income Tax Liability, \$18,-733.38.

13. That, accordingly, there are due, and there are hereby claimed from the petitioner for the years 1943 and 1944 the deficiencies and penalties as set forth in the notice of deficiency and below:

1943: Deficiency of Income and Victory Tax, \$49,747.91; 50% Penalty, \$24,873.96.

1944: Deficiency of Income Tax, \$18,733.38; 50% Penalty, \$9,366.69.

14. That the said income tax returns for 1943 and 1944 which were filed by the petitioner are false and fraudulent and were prepared and filed with intent to evade tax, and, therefore, the said deficiencies for the years 1943 and 1944 are due to fraud with intent to evade the true and correct taxes due from the petitioner for said taxable years.

Wherefore, respondent prays that the Court determine the deficiencies and penalties involved herein to be the amounts determined by the Commissioner.

/s/ MASON B. LEMING,

Acting Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel

R. E. Maiden, Jr., W. P. Flynn, Jr., Special
Attorneys, Bureau of Internal Revenue

[Endorsed]: T.C.U.S. Filed February 8, 1952.

[Title of Tax Court and Cause No. 37941.]

REPLY

The petitioner by his counsel, Sidney R. Reed, Charles J. Munz, Jr. and Edward D. French, for reply to the allegations affirmatively set out by the respondent in his answer, admits and denies as follows:

11. Admits the allegations contained in paragraph 11. of the answer.

12. Admits that during the years 1943 and 1944 petitioner was in the business of buying and selling liquor. Denies the remaining allegations contained in paragraph 12. of the answer.

13. Denies the allegations contained in paragraph 13. of the answer.

14. Denies the allegations contained in paragraph 14. of the answer.

15. Denies each and every allegation contained in the answer not hereinbefore specifically admitted, qualified or denied.

Wherefore, petitioner prays that the deficiencies and penalties requested by the respondent in his answer be denied.

/s/ SIDNEY R. REED,
/s/ CHARLES J. MUNZ, Jr.,
/s/ EDWARD D. FRENCH,
Counsel for Petitioner

[Endorsed]: T.C.U.S. Filed March 20, 1952.

[Title of Tax Court and Causes No. 37940-41.]

MOTION TO VACATE DECISION AND FOR RECONSIDERATION BY THE FULL COURT

Now come the Petitioners by their counsel, Sidney R. Reed, and respectfully move that the Court vacate the Court's decision dated June 30, 1954, in the above titled matter and the Full Court reconsider the evidence and record.

In support of said motion, Petitioners accompany this motion with written argument showing the determination to be arbitrary, excessive on the facts and to be founded on inference alone.

Dated at Los Angeles, California, July 23, 1954.

Respectfully submitted,

/s/ SIDNEY R. REED,

Counsel for Petitioners

[Endorsed]: T.C.U.S. Denied August 2, 1954.

Signed John W. Kern, Chief Judge.

[Endorsed]: T.C.U.S. Filed July 27, 1954.

[Title of Tax Court and Causes No. 37940-41.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Petitioner was engaged in the wholesale liquor business in 1943 and 1944. He made sales of liquor at prices in excess of the O.P.A. ceiling. He did not keep any books or records which adequately reflected his receipts and expenditures. His true net

income from business in each year was understated in his tax returns in substantial amounts. Held, upon the facts: (1) Respondent was justified in reconstructing petitioner's net income by use of an acceptable method. (2) The amounts of certain business expense deductions incurred and paid by petitioner determined. (3) Part of the deficiency in petitioner's income tax in each year is due to fraud with intent to evade tax.

Mr. Sidney R. Reed, for the petitioners.

Clayton J. Burrell, Esq., for the respondent.

Harron, Judge: The Commissioner determined deficiencies in the petitioners' income tax for 1943 and 1944, and additions thereto for fraud under section 293(b), I.R.C. as follows:

5		50% addition under	
Docket No.	Year	Deficiency	Sec. 293(b), I.R.C.
37940 Ruth Sterns	1943	\$51,923.66	\$25,961.83
	1944	18,970.12	9,485.06
37941 Cy Sterns	1943	49,747.91	24,873.96
	1944	18,733.38	9,366.69

The respondent concedes that the questions presented relate to the petitioner, Cy Sterns, only. The petitioner, Ruth Sterns, is involved only because the petitioners report income on the basis of the community property laws of California.

In the taxable years, Cy Sterns sold liquor and his operations constituted his business. The respondent has determined that the income earned by Cy Sterns was understated in the returns to the extent of \$160,492.21, for 1942, and \$75,615.24, for 1943.

The issues, in general, are:

(1) Whether the Commissioner determined the correct amount of the petitioner's net income from business.

(2) Whether the Commissioner erred in disallowing, in whole or in part, certain nonbusiness deductions claimed by petitioners.

(3) Whether part of the deficiencies in Docket No. 37941, Cy Sterns, is due to fraud with intent to evade tax.

Findings of Fact

The facts which have been stipulated, are found as facts, and the stipulation is incorporated herein by this reference.

Petitioners, husband and wife, are residents of Los Angeles, California. Each filed individual income tax returns for the years 1943 and 1944 with the collector for the sixth district of California. The returns were filed on a cash-calendar year basis. Since the issues presented relate to the business conducted by Cy Sterns, he is referred to hereinafter as the petitioner.

In 1943, petitioner, through contacts with various distillers, was able to secure the delivery of quantities of liquor, which was then in short supply. He also had customers for the liquor. He did not have the license or facilities for conducting a wholesale liquor business. In order to facilitate his sales of liquor, he entered into an agreement on October 1, 1943, with the South Pacific Wholesale Company, referred to hereinafter as South Pacific, a wholesale liquor dealer located in Los Angeles. The agreement provided, inter alia, that petitioner was

to secure the delivery of liquor from distillers to South Pacific. South Pacific was to pay the invoice price, taxes, and handling charges on each shipment, make deliveries of the liquor to the petitioner's customers, and, after deducting its fee, was to account to the petitioner for all profits realized. For its services, South Pacific was to receive a fee of \$2 a case.

During 1943 and 1944, South Pacific handled 13,344 cases of liquor for the petitioner pursuant to the agreement. In some instances petitioner's customers paid South Pacific for the liquor, in other instances they paid the petitioner directly. Payments were made both by check and in cash.

During 1943 and 1944, the petitioner sold liquor at prices in excess of the maximum ceiling prices established by the O. P. A. In October 1946, petitioner was convicted in the United States District Court for the Northern District of California of violating the Emergency Price Control Act of 1942, as amended. The offense for which he was convicted occurred in 1944.

The petitioner did not keep any books or records of either his business or personal receipts and expenditures. The only record allegedly kept by the petitioner consisted of a loose leaf book which purported to show his sales of liquor at O. P. A. prices, and the amounts of his refunds to customers during 1943 and 1944. The books and records of South Pacific did not reflect the amounts paid by the petitioner's customers either to South Pacific or to the petitioner.

The petitioner's net income or loss from business for 1943 and 1944 as reported in his tax returns, and as determined by the respondent are as follows:

Year	Reported in return	Determined by respondent
1943	\$10,204.61	\$160,492.21
1944	(2,881.18)	75,615.24

In 1943 and 1944, the petitioner deposited in various banks in Los Angeles business receipts totaling \$211,214.68, and \$76,088.91, respectively. A part of the petitioner's business receipts for each year were not deposited in any bank.

The respondent reconstituted petitioner's net income from business as follows: He included as gross income for each year the total of bank deposits plus undeposited checks and cash, after making allowance for such identifiable nonincome items as loans, redeposits, and transfers from one bank account to another. He allowed deductions in each year from the gross income thus determined for substantiated business expenses.

The respondent was justified in reconstructing petitioner's net income from business by use of an acceptable method.

The following items included by the respondent in petitioner's gross income from business for 1943 did not constitute income to the petitioner:

Item	Amount
Checks from South Pacific payable to H. P.	
Hanthorn	\$ 2,908.74
Mike O'Hara	2,000.00
Funds used by petitioner to purchase a tele- graphic money order.....	25,000.00
Total.....	<u>\$29,908.74</u>

The petitioner is entitled to business expense deductions for 1943, in addition to the amounts allowed by the respondent, for refunds to customers, for cost of merchandise, and for miscellaneous expense as follows:

Item	Amount allowed by respondent	Amount paid by petitioner	Additional deduction
Refunds to customers	\$ 29,564.70	\$ 41,620.35	\$12,055.65
Cost of merchandise	97,637.91	129,360.34	31,722.43
Misc. expense	.....	2,681.74	2,681.74
Totals	\$127,202.61	\$173,662.43	\$46,459.82

The petitioner made refunds in cash in the amount of \$10,465.35, and by check in the amount of \$31,155., or a total of \$41,620.35.

In 1943 the petitioner's net income from business was not less than \$91,749.30.

The following items included by the respondent in petitioner's gross income from business for 1944 did not constitute income to the petitioner:

Item	Amount
Loans to petitioner.....	\$10,450
Bank deposit in n/o Mrs. H. P. Hanthorn.....	2,538
	<hr/> \$12,988

The petitioner is entitled to business expense deductions for 1944, in addition to the amounts allowed by the respondent, for refunds to customers, for cost of merchandise, and for miscellaneous expense as follows:

Item	Amount allowed by respondent	Amount paid by petitioner	Additional deduction
Refunds to customers	\$ 10,140.00	\$ 13,638.35	\$ 3,498.35
Cost of merchandise	45,695.65	55,218.35	9,522.70
Misc. expense	.....	7,204.69	7,204.69
Totals	\$ 55,835.65	\$ 76,061.39	\$20,225.74

The petitioner made refunds in cash in the amount of \$3,900, and by check in the amount of \$9,738.35.

In 1944 the petitioner's net income from business was not less than \$46,301.50.

Petitioners paid medical expenses in 1944 in the amount of \$1,575.08.

The petitioners are not entitled to any nonbusiness expense deductions for taxes or charitable contributions in 1944.

Part of the deficiency in Docket No. 37941, Cy Sterns, for each of the years 1943 and 1944 is due to fraud with intent to evade tax.

No part of the deficiency in Docket No. 37940, Ruth Sterns, for each of the years 1943 and 1944 is due to fraud with intent to evade tax.

Opinion

The petitioner did not keep any regular books of account reflecting either his business or personal receipts and expenditures. Nor did the records which were kept by South Pacific show the amounts paid in 1943 and 1944 by petitioner's customers either to South Pacific or directly to the petitioner. The petitioner admits that he made several sales of liquor during 1943 and 1944 at prices in excess of the O. P. A. ceiling and the evidence adduced by respondent establishes that he made other sales at prices in excess of the O. P. A. maximum. He was convicted in 1946 of violating the Emergency Price Control Act of 1942; the violation occurred in 1944. Large sums of money were unquestionably received by petitioner in connection with the operation of his

business in 1943 and 1944. These sums were not reflected in any books or records and they were greatly disproportionate to the income reported by petitioner in his tax returns. Under the circumstances, the respondent was justified in reconstructing the petitioner's income by use of an acceptable method. See *Louis Halle*, 7 T.C. 247, affd. 175 F.2d 500, certiorari denied 338 U.S. 949; *Max Cohen*, 9 T.C. 1156, affd. 176 F.2d 394; *Arlette Coat Co., Inc.*, 14 T.C. 751.

The petitioner has the burden of establishing substantial error in the respondent's reconstruction of income. This he has not done. We are not impressed with the petitioner's testimony. With a few exceptions, he has failed to come forward with any convincing evidence that the substantial sums which were admittedly received by him in 1943 and 1944 constituted anything other than taxable income to him. Petitioner did establish by creditable evidence that a few items included as income by the respondent in each of the years 1943 and 1944 were nonincome items. Also, that he is entitled in each year to larger deductions for cost of goods sold, for refunds to customers, and for miscellaneous business expenses than were allowed by respondent. Petitioner is entitled to deductions for the above items in amounts as set forth in the Findings of Fact. In all other respects, the respondent's determination of the deficiencies is sustained for failure of proof.

The respondent has the burden of proving fraud by clear and convincing evidence. He has met that burden. We are satisfied from all of the evidence

and the record that part of the deficiency in the petitioner's income tax for each of the years 1943 and 1944 is due to fraud with intent to evade tax.

Respondent concedes that the fraud penalty should not be imposed in Docket No. 37940, petitioner, Ruth Sterns.

Decisions will be entered under Rule 50.

The Tax Court of the United States
Washington

Docket No. 37940

RUTH STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determinations of the Court in its Memorandum Findings of Fact and Opinion filed on June 30, 1954, the petitioner filed recomputations under Rule 50 with which the respondent agrees. Accordingly, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1943 and 1944 in the amounts of \$21,947.43, and \$8,222.20, respectively; and that no deficiencies in penalty under section 293(b) of the 1939 Code are due from this petitioner.

[Seal] /s/ MARION J. HARRON, Judge

Entered and Served October 26, 1954.

The Tax Court of the United States
Washington

Docket No. 37941

CY STERNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determinations of the Court in its Memorandum Findings of Fact and Opinion filed on June 30, 1954, the petitioner filed recomputations under Rule 50 with which the respondent agrees. Accordingly, it is

Ordered and Decided: That there are deficiencies in income tax and penalty under section 293(b) of the 1939 Code as follows:

Year	Deficiency	Sec. 293(b)
1943	\$19,771.68	\$9,885.84
1944	8,016.79	4,008.40

[Seal] /s/ MARION J. HARRON,
Judge

Entered: October 26, 1954.

Served: October 26, 1954.

[Title of Tax Court and Cause No. 37940.]

PETITION FOR REVIEW

Taxpayer, the petitioner in this cause, by Orville W. McCarroll, counsel, hereby files her petition for review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on the 26th day of October, 1954 determining the deficiencies in petitioner's Federal Income Tax for the calendar years 1943 and 1944 in the respective amounts of \$21,-947.43 and \$8,222.20, and respectfully shows as follows, to wit:

I.

That petitioner is domiciled in and is a resident of the County of Los Angeles, State of California, and filed her individual income tax returns for the years 1943 and 1944, respectively, with the Collector of Internal Revenue for the Sixth Collection District of the State of California at Los Angeles, California; that this Petition for Review is filed pursuant to the provisions of Section 7482(a) and 7482(b)(1) of the Internal Revenue Code of 1954.

II.

Nature of the Controversy

That the controversy involves the proper determination of the petitioner's liability for Federal Income Taxes for the calendar years 1943 and 1944.

During the years herein involved, petitioner's husband was engaged in the purchase and sale of liquor. As petitioner's husband did not possess a

United States Government permit authorizing him to carry on a business as a liquor wholesaler, petitioner's husband entered into an arrangement with South Pacific Wholesale Company, a licensed wholesale liquor dealer, in the City of Los Angeles, County of Los Angeles, State of California, wherein and whereby said South Pacific Wholesale Company accepted deliveries of said liquor from the producer thereof and made deliveries to customers of petitioner's husband according to the direction of petitioner's husband. That periodic reports were rendered by said South Pacific Wholesale Company to petitioner's husband reflecting the amounts of liquor received by said South Pacific Wholesale Company for and on behalf of petitioner's husband, and showing also the deliveries made therefrom. During said period petitioner's husband and said South Pacific Wholesale Company handled and sold great quantities of liquor. During said period petitioner took no active part in the business so conducted by her said husband and the income reflected by respondent in the deficiency notice represented petitioner's community half interest in the alleged income from the said business.

Petitioner's husband caused petitioner's income tax returns to be prepared by an independent public accountant from the settlement statements rendered by said South Pacific Wholesale Company and other books and records kept and maintained by petitioner's husband. Petitioner, not being versed in accounting or accounting methods or in the preparation of tax returns, accepted the said tax returns so

prepared as correct and signed and filed the same with the Collector of Internal Revenue for the Sixth Collection District of the State of California.

Respondent subsequently audited petitioner's tax returns and the tax returns of petitioner's husband for the years 1943 and 1944 and determined that the books and records of account maintained by petitioner's husband did not fully or adequately represent the true income of petitioner's husband or petitioner's community half interest therein. Respondent thereupon resolved to determine petitioner's net income by the "bank deposit method", which presumes that all amounts deposited in a bank account belonging to the taxpayer represent income. Upon the conclusion of said examination by respondent, respondent determined deficiencies in petitioner's income tax for the years 1943 and 1944 in the respective amounts of \$51,923.66 and \$18,970.12; and assessed penalties in the respective amounts of \$25,961.83 and \$9,485.06.

Upon the trial of the said matter in the Tax Court, respondent concluded that the penalties were not applicable and offered no evidence in regard thereto; whereupon the Tax Court determined that no penalty was due from petitioner herein. Upon the trial of the said matter, however, the Tax Court determined an ultimate deficiency against petitioner herein in the sum of \$21,947.43 for the year 1943 and \$8,222.20 for the year 1944.

III.

That said taxpayer, being aggrieved by the find-

ings of fact and conclusions of law contained in said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to petition for a review thereof by the United States Court of Appeals for the Ninth Circuit; that petitioner respectfully requests and petitions that the review of said decision herein be consolidated with and heard with the review in regard to Tax Court Docket No. 37941.

/s/ ORVILLE W. McCARROLL,

Counsel for Petitioner

/s/ RUTH STERNS,

Petitioner

[Endorsed]: T.C.U.S. Filed January 31, 1955.

[Title of Tax Court and Cause No. 37941.]

PETITION FOR REVIEW

Taxpayer, the petitioner in this cause, by Orville W. McCarroll, counsel, hereby and herewith files his petition for review by the United States Court of Appeals for the Ninth Circuit of the decision heretofore rendered by The Tax Court of the United States rendered on the 26th day of October, 1954, determining deficiencies in petitioner's Federal Income Taxes for the calendar years 1943 and 1944 in the respective amounts of \$19,771.68 and \$8,016.79, and penalties under Section 293(b) of the Internal Revenue Code of 1939 in the respective amounts of \$9,885.84 and \$4,008.40, and respectfully shows as follows, to wit:

I.

That petitioner is domiciled in and a resident of the County of Los Angeles, State of California, and filed his individual income tax returns for the years 1943 and 1944, respectively, with the then Collector of Internal Revenue for the Sixth Collection District, State of California, at Los Angeles, California.

That this Petition for Review is filed pursuant to the provisions of Section 7482(a) and 7482(b)(1) of the Internal Revenue Code of 1954.

II.

Nature of the Controversy

The controversy involves the proper determination of petitioner's liability for Federal Income Taxes for the calendar years 1943 and 1944.

During the years in question petitioner was engaged in the business of selling liquor to cafes and cocktail bars. During the period involved petitioner had access to great amounts of liquor, but having no United States Government permit to carry on a business as a liquor wholesaler he entered into an arrangement with South Pacific Wholesale Company, a licensed wholesale liquor dealer, situate in the City of Los Angeles, County of Los Angeles, State of California, to accept delivery of said liquor. Petitioner would then sell the said liquor and would direct said South Pacific Wholesale Company to make deliveries to the persons purchasing the same. South Pacific Wholesale Company

kept detailed records of all liquor purchased for the account of petitioner and thereafter delivered pursuant to petitioner's directions. During the period here involved petitioner and said South Pacific Wholesale Company handled and sold great quantities of liquor.

Petitioner's income tax returns for the years in question were prepared by an independent public accountant from settlement statements issued by said South Pacific Wholesale Company settling the account between petitioner and said wholesale company. Said settlement statements reflected the amounts of liquor purchased for the account of petitioner, giving the quantity and the price thereof. Said statements further indicated the amount of liquor thereafter delivered for petitioner's account. Said independent public accountant also had access to other books and records of account kept and maintained by petitioner in regard to said business. Petitioner, having very little formal education, and not being versed in business record keeping or the preparation of income tax returns, accepted the said return prepared for him by said independent public accountant and filed the same as correctly reflecting his income for the period involved.

Respondent herein subsequently audited petitioner's income tax returns for the period herein involved and determined an initial deficiency for the year 1943 of \$49,747.91 with a penalty for said year in the amount of \$24,873.96, and an initial deficiency of income tax for the year 1944 of \$18,-

733.38 and a penalty of \$9,366.69. Respondent based said deficiency upon the fact that the books and records maintained by petitioner did not correctly or adequately represent petitioner's net income for the period involved. Respondent thereupon determined petitioner's income for the years 1943 and 1944 by arbitrarily determining that all amounts deposited in petitioner's bank account represented taxable income. Respondent terms this method of income determination as the "bank receipts" method of income determination.

Hearing was had before the Tax Court of the United States, in which this action and Docket No. 37940 involving petitioner's wife, Ruth Sterns, in a similar action were consolidated for hearing. As a result of said hearing had before said Tax Court, a determination was made that the correct deficiency for the year 1943 amounted to \$19,771.68 and for the year 1944 that the correct deficiency was \$8,-016.79, and that penalties for the years were respectively \$9,885.84 and \$4,008.40.

III.

That said taxpayer, being aggrieved by the findings of fact and the conclusions of law contained in the said findings and opinion of the said Tax Court, and by its decision entered pursuant thereto, desires to petition a review thereof by the United States Court of Appeals for the Ninth Circuit.

That taxpayer further respectfully requests and petitions that the review of the matter of Ruth Sterns vs. Commissioner of Internal Revenue in

Docket No. 37940 be consolidated herewith and be heard simultaneously herewith.

/s/ ORVILLE W. McCARROLL,
Counsel for Petitioner

/s/ CY STERNS,
Petitioner

[Endorsed]: T.C.U.S. January 31, 1955.

[Title of Tax Court and Causes No. 37940-41.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 26, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review," (excepting Joint exhibits 1-A through 5-E, Petitioners' exhibits 6 through 17, (18 and 19 M.F.I. and not left with the record) and 20 through 27, Respondent's exhibits F through I, (J, K, L and M, withdrawn) and N through W), which are separately certified and forwarded herewith), as the original and complete record in the proceedings before The Tax Court of the United States entitled: "Ruth Sterns, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 37940" and "Cy Sterns, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 37941" and in which the Petitioners in The Tax Court proceedings have in-

initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 17th day of March, 1955.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket Nos. 37940 and 37941

CY STERNS and RUTH STERNS,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 9, United States Post Office and Court House Building, Los Angeles, California, October 21, 1953—9:30 a.m.

(Met pursuant to notice.)

Before: Honorable Marion J. Harron, Judge.

Appearances: Sidney R. Reed, 608 So. Hill St., Los Angeles, Calif., appearing for the Petitioners.
Clayton J. Burrell, (Honorable Charles W. Davis,

Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1*]

The Clerk: Docket Nos. 37940 and 37941, Ruth Sterns and Cy Sterns.

Please state your appearances for the record.

Mr. Reed: Sidney R. Reed, for the parties in both cases.

Mr. Burrell: Clayton J. Burrell, for the Respondent.

The Court: May I say, before we start, that the Court had to take care of a matter relating to our San Francisco calendar and we have been delayed a few minutes this morning. I can make up the time, however, because we have all of today and all of tomorrow to hear this case, and we need not feel hurried about the matter at all.

Thank you for waiting on the Court this morning.

Mr. Reed, I think you may want to make an opening statement, or if Mr. Burrell wants to make the opening statement first, because you have a stipulation of facts—you may proceed with either way, whichever is the better.

Mr. Burrell: Whichever you desire.

Mr. Reed: I would just as soon make the opening statement. Does your Honor prefer to have me stand?

The Court: It is customary in our court, as in the United States District Court, for counsel to stand. During the trial of the case you may find

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

that you want to sit down to rest a little. That is all right. I don't insist [3] that counsel stand during the trial of the case, but I might suggest to you that it depends a little bit on the practical side of it. Sometimes the reporter hears you better and the witness hears you better if you stand and are near the witness box.

But on the whole please proceed in the way that will be most comfortable to you.

Mr. Reed: Thank you.

Opening Statement on Behalf of the Petitioners
By Mr. Reed

Mr. Reed: In this case, your Honor, the Petitioners are husband and wife. I believe it is the intention of Mr. Burrell to agree to consolidate the two cases.

The Court: Will you just make a motion to consolidate, yourself?

Mr. Reed: I move the Court to consolidate these two cases for hearing.

The Court: The motion is granted. These proceedings are consolidated.

Mr. Reed: The Petitioner Sterns conducted a wholesale liquor business. He had no federal basic permit. He did, however, have a state license. Because of the lack of this federal permit, he made an arrangement with the South Pacific Wholesale Company, who did have a permit, to sell through that firm. The business was entered into in 1943 [4] and terminated in 1944.

For a few months during that period there was

a shortage of liquor which caused that business to be very active and put the liquor people in somewhat of a frenzy to obtain liquor. That resulted in the Petitioner receiving large sums of money, something he had been unaccustomed to before during his lifetime.

The Petitioner left school at the age of nine. He had no formal education; never had any experience in keeping records, and therefore he did what would be natural, he took in large sums of money and kept track of it on slips of paper.

Nevertheless, he deposited some in the bank, carried large sums of money in his pocket. Many times he took large sums of money on deposit for whiskey that he couldn't deliver. Later he refunded those sums.

In his tax return he employed a professional accountant. The accountant resorted to the records of South Pacific Wholesale Company and other records that were furnished him by the Petitioner in preparing his return. The returns did not understate the net income. There were these large sums of money that were handled—they were not income. The Commissioner contends there was \$236,000.00 unreported income in the years '43 and '44, all received within a few months' time. He has adopted the bank deposit theory of determining that income. \$236,000.00 is such a large sum, I am sure the [5] evidence will disclose the Commissioner's theory is so improbable that it is not credible.

On the contrary, the Petitioner will show a loss of substantial amount. At the time he terminated

the business in 1944, he had not only lost what he went into the business with in 1943, but he was heavily in debt.

That is all.

Mr. Burrell: I will add a few words, your Honor, for clarification.

Opening Statement on Behalf of the Respondent

By Mr. Burrell

Mr. Burrell: This case involves two years, 1943 and 1944, both of which years Commissioner has asserted deficiencies in both cases.

About the fraud penalty, at the outset the Respondent concedes error in asserting the fraud penalty on Petitioner Ruth Sterns. No proof will be adduced and it will be deemed to be conceded by the Commissioner.

It is true that upon investigation by the Government agents, and finding no books of account being kept by the Petitioner Cy Sterns, or at the very least inadequate books not properly reflecting his income, a reconstruction of his income was resorted to by the so-called bank deposits plus other unexplained receipts and adjustments thereto.

In this case, due to the fact that the Petitioner [6] ran a business, so to speak, of buying and selling liquor through his bank deposits, the agent who investigated the case gave due credit for an analysis of the account, cost of merchandise, transfers, loans, any other things that he could trace and discover as being offset, being against presumed income.

I should like to note to the Court that nine or

ten years have passed since the years involved in this case, the people with whom the Petitioner was dealing in whiskey, most of them owned and operated bars, taverns, et cetera. The Government has attempted to locate a great number of these people who were originally investigated and talked to by the agents. We have issued a number of subpoenas, many of which could not be served because the people could not be located.

The banks which carried the accounts of Mr. Sterns, and which accounts are the basis for our reconstruction of income have been subpoenaed, and at this moment we are holding them ready to appear with documents.

However, Mr. Reed and I have discussed this case over many, many times, and we have stipulated the total amount, the beginning figures of each of the two years involved. I do not believe, and I believe Mr. Reed agrees with me, that it should be necessary to bring in the bank officials with their original documents. And, if your Honor [7] please, we will attempt to try the case without actually calling them down to court.

In addition, one of the special agents from Special Intelligence working on this case is temporarily in charge of his office here in this city, and it is very difficult for him to come down. However, in the event we need him, he will come promptly on a telephone call. His name is Mr. Davis.

I believe that is all we have to offer.

The Court: Who will present the stipulation of facts?

Mr. Burrell: I have it in my possession and will be glad to present it, if you wish.

The Court: The stipulation of facts is received and made a part of the record.

Is there anything further of a preliminary nature? Do you want to introduce returns at this time?

Mr. Burrell: Mr. Reed may want to refer to them. It might be—I will introduce as a joint exhibit Respondent's Exhibit A and Petitioners' Exhibit 1——

The Court: 1-A.

Mr. Burrell: 1-A.

The Court: What year?

Mr. Burrell: That is the individual return of Ruth Stearns for the year 1943.

The Court: I will receive all of them after you have [8] identified them.

Mr. Burrell: The individual return of Ruth Sterns for the year 1944, as 2-B.

The individual return of Cy Sterns for the year 1943, as 3-C.

The individual return of Cy Sterns for the year 1944, as 4-D.

And the amended return of Cy Sterns for the year 1944, as 5-E.

(The documents above referred to were marked Joint Exhibits Nos. 1-A through 5-E for identification.)

Mr. Burrell: I would like to note for the record that attached to these returns are certain waivers,

consents to extension to the Statute of Limitations, duly executed by the Petitioners involved.

The Court: Exhibits Nos. 1-A, 2-B, 3-C, 4-D and 5-E are received in evidence.

(The documents heretofore marked Joint Exhibits Nos. 1-A through 5-E were received in evidence.)

Mr. Burrell: May I have the permission of the Court to withdraw these returns and substitute photostats?

The Court: You may do that.

Mr. Reed, I think we are ready to have you proceed now.

Mr. Reed: Mr. Sterns, please. [9]

The Court: Raise your right hand and be sworn. Whereupon,

CYRUS STERNS

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Court: You may be seated. Will you please give your full name and address to the reporter? Give your present address.

The Witness: Cyrus Sterns, 126 Stonehaven Way, Los Angeles 49.

Direct Examination

By Mr. Reed:

Q. Mr. Sterns, are you one of the Petitioners in this proceeding? A. Yes.

Q. Is Ruth Sterns your wife? A. Yes.

Q. What did your education consist of?

(Testimony of Cyrus Sterns.)

A. I left school when I was about—when I was about nine years old.

The Court: Let me see now. What was your answer?

The Witness: When I was about nine years old.

By Mr. Reed:

Q. How old are you now? [10]

A. Going on 66.

Q. Between the time you left school and 1943 did you have any other formal education that would help you to understand record-keeping and keeping of books? A. No.

Q. In 1942 did you become interested in the liquor business?

A. In 1942 I went to work for a wholesale liquor concern by the name of Von Runkel, I think it was.

Q. And in 1943, state the nature of your business.

A. I went to work for them with the theory that I wanted to learn the liquor business, and I applied for a wholesale liquor permit.

In the interim I became acquainted with the distributor, the distiller, and made a deal with him whereby he would furnish me with liquor. They had spent over \$300,000.00 in this area trying to sell their merchandise, and it was a low-grade whiskey, and of course they had no success. And when the shortage came along it was a good opportunity for them.

So not having a basic permit, I—the first deal

(Testimony of Cyrus Sterns.)

was on Baltimore Club, that I was supposed to get through a concern by the name of Harry Greski, G-r-e-s-k-i, I think is their name, and he advised me that they controlled about 80,000 cases. [11]

I went out then, and I knew some of the trade, and went around and told these people that I would be able to furnish them with whiskey.

The Court: How much?

The Witness: Well, whatever they wanted. I went out and they gave me deposits. This was in July, I think it was. They give me deposits and I in turn turned those deposits over to the Greski Company. They never delivered a bottle of whiskey until sometime in October.

In the interim these fellows, they call me at 1:00 o'clock, 2:00 o'clock, 3:00 o'clock in the morning demanding their whiskey. I had to go out then and buy retail from different stores, wherever I was able to get it. They didn't want their money back. They threatened to take me for a ride.

Mr. Reed: You made an arrangement, I believe with South Pacific——

The Court: Go ahead.

The Witness: Then October 1st they got a shipment of whiskey. That wasn't the whiskey that I sold, or represented as the whiskey that came in, and they then advised me or introduced me to the South Pacific Wholesale Company.

The Court: I am going to follow you very carefully. We are making a record and I am going to read it afterwards, and if I wait until later to ask

(Testimony of Cyrus Sterns.)

a few questions so that we don't have any loose ends, it will be too late. [12]

Greski Company, that is the company——

The Witness: Yes.

The Court: ——you say never delivered——

The Witness: Any whiskey over a period of three months or more. I think the first they delivered was in October, October 1st. They got a shipment, but it——

The Court: About when did you go to them in the first place?

The Witness: Must have been July.

The Court: And it wasn't until October, you say, that they began——

The Witness: They gave me approximately 900 cases.

The Court: Of what?

The Witness: Of Baltimore Club. Now, I paid them out of the bank deposits, withdrew from the bank. They wouldn't take anything but cash. And I withdrew most of that money from the bank, Bank of America on Santa Monica and—well, two blocks east. I don't remember the cross street. It was two blocks east of Robertson.

The Court: Now, Mr. Reed, just so that you will do this rather than the Court,——

The Witness: May I interrupt——

The Court: Will you go along slowly with Mr. Sterns and observe when he may go a little too fast and leave out the necessary details. Remember, it is always the who, when, [13] where and why.

(Testimony of Cyrus Sterns.)

Mr. Reed: Yes.

The Court: And Mr. Sterns, I sometimes have to say, we just have to go gradually and take up one point at a time, one thing after another, and don't try to hurry.

Now, Mr. Reed will watch you and suggest that you stop a minute and complete your thought.

Mr. Reed, I want to know, for example, as Mr. Sterns testifies, when he says he withdrew money from the Bank of America; he may want to finish that sentence. Please go back and say, "How much money was withdrawn? What was the charge for the 900 cases of Baltimore Club?" You keep in mind, please, what is involved in writing findings of fact.

And, Mr. Sterns, I guess you are going to be on the stand for quite a while. Take it easy. I am going to ask the Clerk to give you a glass of water. Just sit back and relax. It is really very fortunate in our court here that we have a small courtroom and there are not many people here, and you need not feel concerned at all about this. We want to do the fair and right thing, and we want to hear everything that you have got to offer. Sometimes it is very hard to get a witness to go slowly enough to give us the details.

By Mr. Reed:

Q. Mr. Sterns, how much did you withdraw from the bank, do you recall, that you transferred to Greski? [14]

A. Well, I think the total amount—I can't re-

(Testimony of Cyrus Sterns.)

member. Whenever I would order out—I think it was around \$22,000.00 or \$24,000.00, I think, for that 900 cases, that I was charged with the freight, and then paid them a dollar.

Q. Did that go to them direct, or through South Pacific——

A. No, the only charge then, South Pacific charged me \$2.00 a case for clearing it.

Q. Who was South Pacific?

A. Mr. Edward Syracuse and Mr. Perneti. I think he was a partner or an associate, or something.

The Court: About how much a case would he be paying for the whiskey; you better ask him that.

Q. (By Mr. Reed): How much was that whiskey a case?

A. I think it averaged—I don't remember. I have the records there. I think it was around \$20.00 or \$21.00 a case. Then you have got your state tax, which was \$1.92, and freight of a dollar, and that is the actual cost. Now, that doesn't include the dollar for clearing from the Greski Company, and \$2.00 clearing for South Pacific.

Mr. Reed: Your Honor, we have got approximately 12,000 cases that we are concerned with in the proceeding, and I think we have invoices regarding most of it, through the South Pacific Company, that we are going to take up at the moment.

I offer what purports to be an agreement between South Pacific Wholesale Company and the peti-

(Testimony of Cyrus Sterns.)

tioner Cy Sterns, as Petitioners' Exhibit next in order.

Mr. Burrell: I have seen it, your Honor, and I have no objection.

The Court: Received as Petitioners' Exhibit No. 6.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 6.)

Q. (By Mr. Reed): Mr. Sterns, I hand you Petitioners' Exhibit No. 6, and I ask you if that is your signature. A. Yes, sir.

Q. Is this substantially the agreement or the entire agreement between you and South Pacific Wholesale Company?

A. Not on the entire agreement, but that one——

Mr. Reed: Would you Honor care to see this? It is a brief summary of their entire agreement.

The Court: Yes, sir. I suggest, Mr. Reed, that you have Mr. Sterns explain his arrangements. These things have to get into the record. Furthermore, the Court doesn't know anything about wholesale liquor transactions, how they are carried on. I mean, the whole arrangement of having a concern purchase liquor and then having somebody sell it for them is an unusual sort of transaction that ought to be explained and, again, step by step. [16]

Q. (By Mr. Reed): Mr. Sterns, please explain how you conduct your business. Explain how you sold it to your customers, the relationship with

(Testimony of Cyrus Sterns.)

South Pacific and the relationship with the distillers that sold through South Pacific.

The Court: Let me ask you one question there. Did you have only one transaction with Greski?

The Witness: No, that was over a period of time, and when——

The Court: What is the relationship of Greski to South Pacific Liquor Company? You see, you have got to show where these different people that you did your business with fit into the picture.

The Witness: I met the South Pacific people through the Greski people. It was my understanding that they, in themselves, when I started with wholesale liquor dealers here, and that when the merchandise—Harry Greski was a distiller or a wholesaler, I don't know which, back East somewhere, and I think Mr. Syracuse, I think he would be able to explain more of that. I don't know their background. They represented to me they could furnish me with this whiskey, and when the whiskey came in and they said, "Well, we couldn't have our state wholesale liquor business, but that I could get a firm who had just gotten their permit and state license and I'd make arrangements where they will take this over and bill it [17] so it will be within the law and the regulations, and so forth.

The Court: Is that the way Greski told you they would furnish some liquor?

The Witness: That is right.

The Court: And South Pacific Liquor Company was that agency?

(Testimony of Cyrus Sterns.)

The Witness: That is right.

The Court: And they agreed to handle liquor that Greski would bring in, or——

The Witness: That was the only transaction that I had with the Greski people. After I found that they was unable to keep their contract, and it was just a matter of life or death, and I was called and threatened and everything else.

The Court: Then you bought only 900 cases of Baltimore Club from Greski?

The Witness: Yes.

The Court: And you got that when?

The Witness: I think they delivered that—they started making their delivery, I think, October 1st.

The Court: Of what year?

The Witness: 1943.

The Court: 1943. And over what period of time did they make deliveries to you? [18]

The Witness: Oh, possibly took three or four days, I guess. My record would show when they finally delivered the last of that 900 cases.

The Court: Did you get any more liquor from Greski, other than the 900 cases of Baltimore Club?

The Witness: No, your Honor.

The Court: Then thereafter who did you deal with here?

The Witness: Then I had a car—I had anticipated getting my basic every day. Every day I was to have my basic.

The Court: What do you mean by that?

The Witness: Federal permit, the basic permit.

(Testimony of Cyrus Sterns.)

I was in touch and I had already had a consignment of Lansdowne out of Chicago.

The Court: Lansdowne what?

The Witness: Lansdowne whiskey. And when the South Pacific Company had handled the Baltimore Club, I asked them if they would handle this other shipment along the same lines, at \$2.00 a case; and they agreed to handle it. And from then on all other merchandise or whiskey I arranged then to ship through them, and the rest of it was the bulk of the business, which was nine or ten thousand cases, I guess, from the Old Monastery Company, who handled the balance of the merchandise which was shipped to us.

The Court: That is not entirely clear. The rest of the business—— [19]

The Witness: Approximately 9,000 or maybe 10,000 cases.

The Court: From Old Monastery—is that the name of a brand, or——

The Witness: The name of the distillery in Seattle.

The Court: That would be a different whiskey than what you call Lansdowne?

The Witness: Yes.

The Court: Lansdowne came from Chicago?

The Witness: From George Platt & Company out of Chicago.

The Court: About how much whiskey did you get from George Platt & Company, Lansdowne whiskey, from Chicago?

(Testimony of Cyrus Sterns.)

The Witness: I think, supposed to be a thousand cases.

Mr. Reed: If your Honor please, we have——

The Court: Let me just finish this, if you will, please. Yes?

The Witness: But we only got nine hundred and some cases, maybe 990, something like that. I can't remember that unless I look at my record.

The Court: And in what year did you get the Lansdowne?

The Witness: 1943. [20]

The Court: Then you say the rest of your liquor came from the Old Monastery Distillery?

The Witness: Yes.

The Court: You mean the rest that is involved?

The Witness: '43 and '44.

The Court: For '43 and '44?

The Witness: Well, may I change that?

The Court: Yes.

The Witness: I would have to add up the difference, because in July we bought some whiskey receipts——

The Court: July of what year?

The Witness: July of '44. And that was supposed to bottle a thousand cases, and that was called Kentucky Age. And that was shipped to Alfred Hart & Company here in Los Angeles.

The Court: Hart, H-a-r-t?

The Witness: H-a-r-t; one of the largest wholesale houses here.

(Testimony of Cyrus Sterns.)

The Court: And actually was shipped to them?

The Witness: The whiskey was, and they bottled it for us, for the South Pacific Company.

The Court: Then they delivered the bottled whiskey to South Pacific?

The Witness: That is, on their order to various—either South Pacific or customers that I had designated. [21]

The Court: Mr. Reed asked you a question, and then the Court interposed a few questions.

Now, what was that question, Mr. Reed?

Mr. Reed: If your Honor please, we have an expert accountant who has gone over the records of South Pacific, gone over the invoices, and Mr. Sterns' records, and I think he will be of great help to us in determining just how much whiskey was handled, where it went, and information as to the price received.

The Court: All right. Now, your question that you asked Mr. Sterns was about the South Pacific Company. Go back to that question. If you remember it.

Mr. Reed: What was that, please? I believe I recall the question.

Q. (By Mr. Reed): Mr. Sterns, in your arrangement with South Pacific were you required to assume expenses such as salesmen, your own office expense, travel expense, and so forth, the expenses of which did not go through their books?

A. My expenses did not reflect in their books at all.

(Testimony of Cyrus Sterns.)

Q. Did you employ salesmen during the years 1943 and 1944?

A. Yes, I did. I paid all the expenses.

Q. Did you maintain an office?

A. Telephone clerk. [22]

Q. Transportation? A. I paid for deliveries.

The Court: Now, you see, that's the thing. If you will, please follow through and complete a thought. The next question is, where did you maintain your office, who did you employ.

Q. (By Mr. Reed): Where did you maintain your office, Mr. Sterns?

A. I had an office on Santa Monica. I can't remember the address. On Santa Monica Boulevard, just a few doors east of Robertson. And then I moved from there on Beverly Drive, next door to the South Pacific Company. That was a little west of La Brea. And I don't remember the address.

Q. How many salesmen did you employ?

A. I had a fellow by the name of Charlie Mehan, Mike O'Hara. Oh, I must have had, I must have had four or five.

Q. Were these salesmen on salary or commission?

A. I give them a dollar a case, and that was it.

Mr. Reed: If your Honor please, I believe we have documentary evidence of considerable of those expenses. I am not sure that I am right, but can we not get into that through Mr. Radke, by having Mr. Radke testify, who is the accountant, have him testify as to them?

(Testimony of Cyrus Sterns.)

The Court: Yes, you can. [23]

Q. (By Mr. Reed): Mr. Sterns, these liquors that you sold, what quality were they?

A. Well, they were not comparable to national merchandise. A lot of it was 20 per cent whiskey, 75 per cent, 65 per cent fruit spirits. Some of them were alcohol spirits.

Q. Mr. Sterns, did you ever buy whiskeys for accommodation for your customers when you couldn't make deliveries?

A. Unfortunately, I went around and pleaded with some of these people to come in and tell the truth as to how many cases of liquor I brought from them, and they don't even remember me.

The Court: That doesn't answer the question.

The Witness: I bought from 300 to 350 cases of standard brands. By that I mean Harper's, Grandad, Hiram Walker, so as these people—during the time that we had no whiskey, because I had their money. They had paid me a deposit for whiskey, so to keep them going. I can give you the names of the people. I brought them. And the Government can check and find if they tell the truth, can find that I am telling the truth.

During the—when I had no whiskey I went out and I covered this entire town, went to drug stores, went to markets, went to package places, got a bottle here and got a bottle there and accumulated four or five cases and would [24] deliver to one customer one day and another day deliver a few cases some

(Testimony of Cyrus Sterns.)

place else, just to keep good faith until our own whiskey arrived.

The Court: What is the profit on a transaction of that kind?

The Witness: I didn't even get paid for the gas I consumed.

The Court: Take it over again, Mr. Reed.

Q. (By Mr. Reed): Was the transaction profitable and did you make money?

A. No, I did not; not a dime.

Q. Why did you do that?

The Court: Let's let him enlarge on that. He says he didn't make any profit. Now, this point goes to the heart of your case, Mr. Reed, and you better have your witness be very clear about that. Have him explain how he would handle the so-called accommodation transactions.

Q. (By Mr. Reed): Please tell the Court just how you carried out a transaction such as that, how the money was handled and how the liquor was delivered.

A. These were very, very hectic days. I'd have a line of people standing in front of my office with all kinds of money. "Here, take it. Hold it. When you get whiskey, [25] deliver it."

I would go out. Maybe I would have \$500.00 from one man and maybe I have a thousand dollars or maybe I have \$45,000.00, I would keep a record as to how much I deposited in the bank. Some gave me cash. Some gave me checks. I would deposit it in the bank until those checks cleared, and then I would

(Testimony of Cyrus Sterns.)

draw a thousand, five thousand, three thousand, and set out to buy. I couldn't very well—they paid me the retail price. I didn't get it through wholesale. I got it through individual retailers and paid them the retail price, and I in turn charged them. I was simply acting as an agent in that particular instance for these people. If a bottle of Hiram Walker was \$4.00 I paid \$4.00, and that was what they paid me; more of an accommodation to keep them quiet until our other merchandise—which we call pour whiskey, over the bar—would be available for them.

Q. Mr. Sterns, did these brands that you mentioned that you got from Old Monastery, Platt and so forth, did you ever sell those at over ceiling prices?

A. Personally, I don't believe that I sold ten or twelve accounts myself. Out of those ten or twelve accounts that I sold, I didn't take any over ceiling prices, with the exception—in San Francisco, I had a fellow up there who was in the bar business, and I shipped him a lot of merchandise, and when I found out that he was getting a terrific price, [26] and in fact, on those shipments I was about breaking even, because two salesmen were involved. So I wound up getting out of those transactions, in this particular case \$2.00 a case, which I took——

Q. On how many cases?

A. Well, there again, possibly eight or nine hundred cases.

Q. About eighteen hundred or two thousand dollars.

A. Yes.

(Testimony of Cyrus Sterns.)

Q. What did you do with that money?

A. Well, I commingled it with other funds. It was always pay this one, pay that one.

Then I had another case up there——

The Court: Just let me interrupt you here a minute. What is the significance of \$2.00 a case?

The Witness: Over ceiling.

The Court: What was the ceiling?

The Witness: Well, on some it was forty some odd dollars, some twenty-six, some twenty-nine. I had no way of knowing what the salesmen had charged, whether they charged \$100.00 or sold it for \$20.00.

The Court: That, I am sorry to say, isn't clear to me. That is why I say we have to sometimes go slowly.

There would be a ceiling price on a case of whiskey, right? [27]

The Witness: Right.

The Court: Would that vary according to the brand of whiskey?

The Witness: Oh, yes, definitely.

The Court: And the ceiling prices would vary from what amount to what amount?

The Witness: Well, ceiling prices would vary from \$29.00 to \$95.00.

The Court: A case?

The Witness: Yes, ma'am, or your Honor.

The Court: Now, you say you don't know what salesmen sold whiskey for. What is the point in mentioning that?

(Testimony of Cyrus Sterns.)

The Witness: Well, I am accused of so much ceiling that I didn't report, and that is not true. I am admitting what I did do.

The Court: You were accused of selling liquor at prices, that is, per case, at prices above the ceiling price.

The Witness: That is right.

Mr. Reed: If your Honor please——

The Court: Now, you say you have mentioned that salesmen sold liquor for you.

The Witness: Your Honor, that is correct.

The Court: Now, please complete your testimony on that. You also stated that you didn't know what they sold it for. [28]

The Witness: That is true.

The Court: Go ahead and complete that.

The Witness: What else can I say?

Q. (By Mr. Reed): Mr. Sterns, how many customers did you have? You mentioned you personally sold about 12.

A. I would say about 12.

Q. How many customers did you have that you considered your customers?

A. About 450.

The Court: 450 customers?

Mr. Reed: Yes, your Honor.

Q. (By Mr. Reed): Mr. Sterns, what is the extent of the over ceiling receipts that you received during the years 1943 and '44; that you personally received?

A. Oh, I don't think I received over \$4,000.00 or \$5,000.00.

Q. And you did what with that money?

(Testimony of Cyrus Sterns.)

A. I just put it together with my other funds.

Q. I see. Mr. Sterns, were you given a suspended six months jail sentence and fined \$5,000.00 because of that over ceiling activity?

A. It was a misdemeanor.

Q. Mr. Sterns, how old are you? [29]

A. 66 years old.

Q. Prior to that offense or that conviction had you ever had a police record?

A. No, I have not.

Q. Have you ever had one since?

A. No, sir.

Q. What did you do with all the moneys you received in your business?

A. I reinvested it in the business. I started that business with about \$15,000.00.

Q. When?

A. In '43. At the end of '44, and then, from the statements that my auditor gave me, it showed I made \$26,000.00 in '43, and \$14,000.00 net, upon which I paid my income. That's '43. And when I woke up in '44 I found that I not only didn't make \$14,000.00, I lost everything I had, plus being in debt from moneys that I had borrowed.

Q. Mr. Sterns, I believe you testified as to the quality of the liquors that you sold. The bulk of this whiskey, was it a brand that commanded a premium?

A. Well, I will say that if I was buying it I wouldn't pay it.

Q. Did you have losses in conducting your business that were not disclosed in your return?

(Testimony of Cyrus Sterns.)

A. Well, in that—if I may go back for a moment, [30] in that case before Judge Roach I was under oath and I made a statement where I had paid \$40,000.00 to a Mr. Weiss, Lou Weiss, and I did that on the guarantee of a Mr. Ostrow, who shipped me the bulk of my merchandise, or my——

Q. Wait a minute. Who is Lou Weiss?

A. Connected with the Pioneer Atlas in Chicago, a very big concern. And Mr. Ostrow said, “I’ll guarantee,” because in the final shipments he shipped, oh, I don’t know, three or four cars open account, which they usually don’t do, due to the fact he had that confidence in me. And at that time we owed them, or I did, for those cars, although they were assigned to the South Pacific Company. I couldn’t refuse to take his word that he said, “Don’t worry, Cy. You will get your merchandise.” Well, I never got a dime’s worth of the merchandise. I lost the \$40,000.00. In the interim, Ostrow died, and this man died.

Q. Did you have a loss in conjunction with a liquor transaction in Cuba?

A. You will have the receipts. The receipts show there I wired \$20,000.00 for the Bank of America at Wilshire and La Brea, and after they received the money they wired me back that I needed \$200,000.00, \$248,000.00 or \$240,000.00, to complete the deal within 48 or 72 hours or I would forfeit the deposit. I didn’t have that kind of money to wire, and consequently I lost \$20,000.00. [31]

Q. You lost \$20,000.00? A. Yes.

(Testimony of Cyrus Sterns.)

The Court: Do you have those telegrams?

The Witness: Yes, they are in my file.

Mr. Reed: We have some exhibits in that respect, your Honor.

The Court: I don't quite understand this transaction yet with Mr. Ostrow. I am sorry. I will have to ask you to go over that. These cases are, of course, difficult for the Court in the long run, and I must be sure that I get the details now as we go along. I don't want to interrupt you too much, but this transaction with Mr. Ostrow and Pioneer Atlas isn't clear.

Now, Mr. Sterns has testified in this one that when he was in Judge Roach's court he testified under oath that he paid \$40,000.00 to somebody, and Mr. Lou Weiss was involved, Pioneer Atlas and Mr. Ostrow. They were to ship three or four cars, I suppose, of whiskey.

The Witness: That would be about one car, about \$40,000.00.

The Court: Well, the witness said three or four cars on open account, South Pacific, and in the end he lost \$40,000.00.

Now, he did say he was going to ship three or four cars because I am taking this close to shorthand notes on [32] this testimony, as close to shorthand as I can. I want that cleared up, please.

Q. (By Mr. Reed): Mr. Sterns, who is Lou Weiss?

A. Well, I never met him until that day at the Towne House.

(Testimony of Cyrus Sterns.)

Q. Where was that Towne House, Los Angeles?

A. Los Angeles.

Q. All right. When was that?

A. Well, sometime in the latter part of January
sometime—first part of January.

Q. What was the——

The Court: Don't you see, Mr. Reed? Latter part
of January, when? 1862?

The Witness: 1944.

The Court: 1944. Now, please answer the ques-
tion, who was Lou Weiss?

The Witness: I understand that he was either
the president or general manager of the Pioneer
Atlas Wholesale Liquor Company in Chicago.

The Court: Go ahead, Mr. Reed.

The Witness: And he was a friend of Mr. Os-
trow's, Harold Ostrow.

The Court: Who is Harold Ostrow?

The Witness: Harold Ostrow was the owner of
Old [33] Monastery Distilleries.

The Court: Where was that located?

The Witness: At Seattle.

The Court: Go ahead.

The Witness: Now, here's where the three or four
cars come in. Mr. Ostrow had shipped South Pa-
cific three or four cars. I know that one of the cars,
the charges on one car was in excess of \$60,000.00,
and the others were in smaller amounts, on open
account.

The Court: That would be a shipment from
Seattle?

(Testimony of Cyrus Sterns.)

The Witness: From Seattle.

The Court: Yes.

The Witness: So he introduced me to Mr. Weiss and told me that they had merchandise. There was no hesitancy on my part to give the man \$40,000.00.

The Court: You better explain that. Now, you apparently met Mr. Weiss and you discussed a deal with him, is that right?

The Witness: Between he and Mr. Ostrow.

The Court: What was the deal? Give us the details.

The Witness: The deal was to ship us 1,500 cases.

The Court: Who was to do the shipping, Atlas?

The Witness: Atlas. Mr. Weiss was the man that—I don't know through whom he was going to ship it, but he was going to ship me this merchandise.

The Court: Weiss was going to ship you how much?

The Witness: Whatever that amounted to, which was \$40,000.00 that I had given him. You know, there may have been a side draft against it for the difference, or he may have shipped it open account.

The Court: Weiss was going to ship as much as liquor as he could get for \$40,000.00?

The Witness: That is right. You never can tell how many cases, for example, in a car. It may be a big car. It may be a small car.

The Court: Then what happened?

The Witness: Nothing. I never got a bottle.

Q. (By Mr. Reed): What steps did you take then to recover your \$40,000.00?

(Testimony of Cyrus Sterns.)

A. No one else in the office knew anything about it. The man had died.

The Court: No one else in the office. Whose office?

The Witness: Mr. Weiss' office.

The Court: Where was his office?

The Witness: In Chicago.

Q. (By Mr. Reed): Did you pay him cash or check? A. Cash.

Q. Where did you get it? [35]

A. Out of the bank and certain deposits that I had with me.

The Court: The question Mr. Reed asked you is what efforts you made to recover your \$40,000.00. Did you get in touch with Pioneer Atlas? First, did you get in touch with them?

The Witness: I called them several times and asked for Weiss, and I was informed that he passed away. Nobody else knew anything about it.

The Court: Then your answer is that you did get in touch with Pioneer Atlas?

The Witness: I have called them several times.

The Court: That is an alleged loss of \$40,000.00 in 1944, as I understand it. And then the witness says that he had a loss of \$20,000.00 in an effort to get some liquor from Cuba.

Mr. Reed: Right.

The Court: But he hasn't said what year that was.

The Witness: That's '44, isn't it?

Mr. Reed: We have an exhibit on that, your Honor.

(Testimony of Cyrus Sterns.)

The Court: Even if you do have, Mr. Reed, I can't read a record intelligently by going from page 20 in the record over to page 108 to find out what is going to complete the testimony on page 20. That doesn't help me in reading the record. You have to visualize your presentation of evidence [36] as though you were dictating something to your secretary.

Now, if the witness is going to talk about a transaction, even though you intend to supplement it in some way you have got to go into the whole thing at one place. Please do that.

Q. (By Mr. Reed): Mr. Sterns, in this Cuba matter, what year did that take place?

A. Doesn't Mr. Radke have the receipt there? It was '44.

The Court: He can refresh his recollection if he wants to. If you have a receipt it has to be shown to Mr. Burrell. The accountant isn't on the stand.

Mr. Reed: Probably Mr. Burrell would stipulate to that.

Mr. Burrell: I may be able to if you give me one second.

Q. (By Mr. Reed): Mr. Sterns, I hand you here what purports to be telegrams and photostatic copies of telegrams. Have you seen that before?

A. Oh, yes.

Q. Does that refresh your memory as to when the transaction took place?

A. Well, this is the—you want me to answer that? [37]

(Testimony of Cyrus Sterns.)

Q. Yes.

A. Well, it would be February 3, 1944.

Q. And what is the amount shown there?

A. \$20,000.00. That is a receipt from the Bank of America. And then they wired me, "Receipt for your draft of \$20,000.00 received"——

Mr. Burrell: May I interrupt in response to his invitation of a stipulation?

The Court: I think it is too late now. You can hold it, at any rate.

Please have that marked for identification as your next exhibit. Hand those to the Clerk, please.

The Clerk: Exhibit 7 for identification; 8 and 9.

The Witness: Those are the duplicates.

The Court: Are they duplicates, Mr. Baird?

The Clerk: They appear to be, your Honor.

The Court: If you have something that is a photostatic copy, I suppose Petitioner only wants to offer the original and then substitute the photostat.

Let's start again now. The next number is 7?

The Clerk: Yes, your Honor.

The Court: 7 for identification. Anything else?

The Clerk: Just one exhibit; 7 for identification.

The Court: 7 for identification. [38]

(The document above referred to was marked

Petitioners' Exhibit No. 7 for identification.)

Mr. Reed: I offer Petitioners' Exhibit No. 7 for identification in evidence.

Mr. Burrell: No objection.

The Court: Are you willing to have the photostat substituted?

(Testimony of Cyrus Sterns.)

Mr. Burrell: Absolutely.

The Court: The photostat is received in evidence as Exhibit 7, and it is—what is it?

Mr. Reed: It is a photostat of a telegram to Cyrus Sterns, signed “Compania Explotadora de Inmuebles y Valores Sa.”

The Court: That relates to the \$20,000.00. Now, the testimony was that he sent \$20,000.00 by wire to the Bank of America. He said “they” wired back that he needed additional money, or something. He didn’t make clear who “they” are. And do I understand that Exhibit 7 shows who “they” are?

Mr. Reed: Yes, your Honor.

The Court: Who wired back?

Mr. Reed: Yes. And let the record show the corrected amount is \$20,020.00 and not \$20,000.00.

(The document heretofore marked Petitioners’ Exhibit No. 7 was received in evidence.)

Q. (By Mr. Reed): Mr. Sterns, did you have a transaction with one John Lewis in 1943 or ’44?

A. John Lewis was the former collector of San Francisco, and I had a salesman by the name of Sam Weiss, W-e-i-s-s, and he overheard the fact that I was trying to find somebody who could expedite getting of my basic permit. He came to me and said, “I can get you—I have an attorney up there”——

The Court: Who came to you?

The Witness: Mr. Weiss came to me and said, “I have an attorney in San Francisco who I think can expedite this basic permit for you.” In other

(Testimony of Cyrus Sterns.)

words, try to get it as soon as I could to stop paying the South Pacific \$2.00 a case, and he said his fee would be \$2,500.00. So I give him \$2,500.00. In fact, I got a thousand dollars—I don't know whether Mr. Syracuse remembers it or not—to draw against my account, and then give him \$1,500.00 at night when he came to my home.

The Court: In cash?

The Witness: In cash. So he said, "If at any time you want your money back," he says, "I'll get it back for you in 24 hours."

Well, one day I started to ask him about it, and I said I didn't believe that he could do anything for me because I understand all basic permits were stopped, and I [40] said, "Why don't you call this attorney?"

So he called him, and I went into my office, my own office, and cut in on his wire, and I heard Mr. Lewis tell him there wasn't any possibility, and I was satisfied that I was taken for \$2,500.00.

So he came to me later and insisted that he could make a deal with me with the General Distillers——

The Court: Who came to you?

The Witness: This Mr. Weiss. ——that he could make a deal for me in San Francisco with the General Distillers to supply 600 cases a week. And he came to one of the other boys and said he was in a very bad situation, issued a check for \$600.00 and unless he was able to make good that check that afternoon, that they would have a warrant for him. So he finally came to me, and I said, "Listen,"—now

(Testimony of Cyrus Sterns.)

I am talking to Mr. Weiss. I says, "I know that you didn't tell me the truth about this \$2,500.00, but if there is a possibility"—I figured that by making this deal in San Francisco, \$600.00 a week, even though he did lie to me, that I would probably be able to recoup this money that I advanced to him. And I was sick at the time. I had not only a heart condition but I had fibrinous thrombosis in my leg; I could hardly walk.

And I said, "Now, if you are in a jam, tell me the truth and I'll give you the \$600.00. But please don't make [41] me drive to San Francisco."

He says, "I am telling you the gospel truth, that I can set this deal up." He says, "You give me \$25,000.00 and I will go up there."

I said, "No, I won't give you \$25,000.00, but" I said, "Mrs. Sterns is in San Francisco. She is up there with her aunt."

This was about 11:00 in the morning and we figured we would leave about 3:00, and I didn't want to drive up there with \$25,000.00 at night. So I went to the Bank of America and wired her \$25,000.00; withdrew it from the bank. I had some cash, and the other I drew from the bank and wired her \$25,000.00.

I got up there that night about 12:00 or 1:00 in the morning. I had one of the salesmen that was driving me, a fellow by the name of Wally Mehan. And we went up there to see Mr. Clark. And, incidentally, his associate was a tax accountant who was handling the business for the General Dis-

(Testimony of Cyrus Sterns.)

tillers, and I told him, and he says, "Why, you must be crazy. We don't have such a deal."

There I was. So——

Q. (By Mr. Reed): What did you do then, if anything?

A. I drove back with that fellow that drove me up and refunded here and there, wherever I got the money from. [42] My wife stayed there another four or five days, I think, and I replaced the money from the people that I got it from.

Q. You borrowed——

A. Borrowed five here, three there; didn't make any difference how much money you wanted at that time, you could always call Jim Jones and whatever you wanted——

Q. Did they give it to you in cash?

A. Always in cash; most of the time in cash.

Q. Not in checks?

A. Checks were not good to me. I couldn't wire checks up there.

Q. What did Mrs. Sterns do with the money you wired her?

A. She give it back to me that morning. I got there at 1:00 in the morning, and then I picked up this money from her and went over to General Distilleries to make the deal, and there wasn't any deal.

Q. Mrs. Sterns you said had been visiting in San Francisco.

A. Yes.

Q. Wasn't there on business? A. Oh, no.

Q. What part did she take in this transaction?

A. Just got the money for me.

(Testimony of Cyrus Sterns.)

Q. Where? [43]

A. At the Bank of America.

Q. I see. A. Big surprise to her.

The Court: You mean when you wired the money?

The Witness: Yes.

The Court: You say she gave you back the \$25,000.00.

The Witness: Yes.

The Court: Then what did you do with the \$25,000.00?

The Witness: Brought it back to Los Angeles.

The Court: Did you originally draw that out of the bank when you wired \$25,000.00 to Mrs. Sterns?

The Witness: I drew some of it—I don't know just how much, but the bank wired the money.

The Court: Did you deposit it back in the bank?

The Witness: No. I may have some. It is a matter of ten years. I can't recall every time I borrowed money.

The Court: I don't understand your testimony when you say that you got one here, two there, three there and you returned it to people. That is too vague for me, and I don't know what you mean.

The Witness: Well, I could call up several people——

The Court: In relation to this \$25,000.00, if it has any relation to it—does that have any relation to the \$25,000.00, about calling up people?

The Witness: Yes. I could call up people when I needed any money. [44]

(Testimony of Cyrus Sterns.)

The Court: Mr. Reed, what is the point, please?

Mr. Reed: This \$25,000.00 that went to San Francisco, I believe the Government's theory is that that is unreported income.

The Court: What are you trying to bring out? See, I can't follow the witness, Mr. Reed. Can you follow him? If you can't follow him I can't follow him. Get him to clarify what he has to say. Go over that again, please.

Q. (By Mr. Reed): Mr. Sterns, in this transaction with John Lewis, I believe you testified that he represented that he could obtain liquor for you in San Francisco. A. Sam Weiss did.

The Court: That isn't his testimony.

The Witness: Sam Weiss.

Q. (By Mr. Reed): Please relate that again.

A. Sam Weiss told me that he could make a deal in San Francisco with General Distillers. I don't know who they were. I knew there was a General Distillers, but I didn't know any of them. He told me that he could make a deal with this distillery to supply 600 cases of whiskey a week and they would want a guarantee that we would take down so many cases, and wanted a guarantee of \$25,000.00. That was not a [45] deposit, just a guarantee—whatever the agreement was, that they would refund the \$25,000.00. In other words, that they were holding the whiskey for us and would not allow them then to sell it to somebody else, and if we don't take it out, and then the flood of whiskey would come

(Testimony of Cyrus Sterns.)

back, they would be stuck there with this whiskey. That is the point.

Q. Where did you get the \$25,000.00?

A. Well, as I usually did, if I had anything that looked like it was a good deal, I go to different—I went to Jack French; I don't remember the individual.

Q. Who did you borrow from on this particular deal? A. I can't remember who.

The Court: The line of this questioning of yours is where did he get the \$25,000.00.

Mr. Reed: Yes.

The Court: Ask him that as a direct question.

Q. (By Mr. Reed): Where did you get the \$25,000.00?

A. Part of it I remember drawing out of the bank. The rest of it I must have gotten from some of my friends, who always were willing to help me. Now, I can't recall on that particular deal.

The Court: Did they give you cash?

The Witness: Always cash; most of the time it was cash. [46]

The Court: Did you deposit the cash they gave you at this time with respect to this \$25,000.00?

The Witness: No, because I had to wire that. I gave the cashier at the bank, plus whatever I had—I may have given \$15,000.00 or \$20,000.00, and withdrew five from the bank account. After ten years I can't say definitely just how that applied.

The Court: Did you put what you collected from

(Testimony of Cyrus Sterns.)

various people in your bank account to make up the \$25,000.00, or did you give cash to the cashier?

The Witness: Gave cash to the cashier, and if I was short, for instance,—as I say, I can't remember whether it was \$20,000.00 I gave them, or \$18,000.00—whatever I gave them.

The Court: The next question is what happened when there was no liquor and Mrs. Sterns gave him back the \$25,000.00? What did you do?

Q. (By Mr. Reed): What did you do after you got this \$25,000.00 from Mrs. Sterns in San Francisco?

A. Came back with it that same day.

Q. What did you do with it?

A. Returned it to various people that I borrowed it from or who loaned money to me.

Q. Did you return all of it? You say you drew some of [47] it out of your bank account.

A. Whatever I took for that particular deal; the rest of it went back in the bank.

Q. Did you make a redeposit in your bank account? A. Possibly.

Q. Do you know whether your records show that

A. I wouldn't remember that. I know that I had to make the refunds when I borrowed the money.

The Court: I think we will take a recess now for a few minutes for the reporter. You may step down.

(Short recess taken.)

The Court: Proceed, Mr. Reed.

(Testimony of Cyrus Sterns.)

Q. (By Mr. Reed): Mr. Sterns, on January 1, 1943, what was your net worth?

A. About \$15,000.00.

Q. What did it consist of?

A. I had about \$5,100.00 or \$5,200.00 worth of securities.

Q. What kind of securities?

A. Oh, General Motors, Diversified. I have a record of them if you want them.

Q. What was the balance?

A. About \$5,200.00. Then I had about, I don't know, maybe about \$8,000.00, maybe about \$13,500.00, around that in cash. [48]

Q. Do you mean then \$13,500.00 in cash?

A. No.

Q. That was your net worth?

A. That was my net worth, outside of—I always had a loan on my car. Outside of that, I don't remember.

Q. Did you have a loan on your car in 1943?

A. Yes.

Q. 1944? A. Yes.

Q. In 1944 what happened in your business?

A. Well, I went broke.

Q. Did you terminate your business?

A. Yes, I did.

Q. When you say you went broke, you mean—

A. Well, I even had been making refunds on moneys that were given to me in '44, '43 and '44, up until last year. In fact, I made another payment

(Testimony of Cyrus Sterns.)

just a few days ago for \$35.00, and I still owe them about \$180.00.

Q. Mr. Sterns, in 1943 and 1944 did you make any gifts of property or money or other assets?

A. I did not.

Q. No gifts whatever? A. No gifts.

Q. In 1943 or 1944 did you secrete any money or property? [49]

A. I did not.

Q. Mr. Sterns, did you and Mrs. Sterns own some jewelry on January 1, 1943? A. Yes, we did.

Q. What happened to that, if anything?

A. I sold it in order to pay some of these losses that I sustained.

Q. Where did you sell it?

A. I sold it to the Boulevard Jewelers on Hollywood Boulevard.

Q. When did you sell it, approximately?

A. I can't remember.

Q. In 1943 or 1944?

A. I think it was '44; could have been a little later. I don't know.

Q. But it wasn't before 1943, and wasn't after '44? A. No, wasn't before '43.

Q. What was the approximate amount you received for that jewelry? A. Almost \$3,000.00.

Q. What could you estimate your personal living expenses to have been in 1943 and 1944?

A. Oh, about \$500.00 a month, unless I would get some of my hospitalization or had to have doctors, and that would cost me considerably more. [50]

(Testimony of Cyrus Sterns.)

Q. Mr. Sterns, I ask you again, were all the moneys you received in your business in 1943 and 1944, aside from your living expenses, lost in the business? A. Lost, definitely.

Q. Mr. Sterns, did you employ a public accountant to prepare your returns?

A. I always had a public accountant prepare my returns.

Q. What material do you give him to prepare the returns from?

A. Well, all memorandums, different commission checks that I have received; all my expenses and so forth.

Q. At the end of 1944 did you owe persons money that you had borrowed and used for business purposes in 1943 and 1944? A. Yes, sir I did.

Q. Can you estimate the amount or do you know the exact amount?

A. No, I wouldn't know the exact amount.

Q. In 1944, Mr. Sterns, you claimed a deduction for contributions of \$100.00, but it wasn't itemized. Can you explain who that was given to?

A. Well, we gave to Community Chest. We gave to Red Cross. Oh, several different—I wouldn't remember just who it was.

Q. How do you know it was \$100.00? [51]

A. Well, I have no way—I know \$10.00 here and \$5.00 there. I approximated about \$100.00.

Q. You had a car in 1944? A. Yes, I did.

Q. And your return claimed a license expense of \$13.60. Did you pay that amount for auto license?

(Testimony of Cyrus Sterns.)

A. Well, whatever was on my income return. I wouldn't know what the actual amount would be without referring back to that.

Q. But you did have a car and it had a 1944 license?

A. Oh, yes. I have had a car since 1910, I guess.

Q. You claimed \$125.00 deduction in your 1944 return on account of sales tax. How did you arrive at that?

A. I imagine it costs us about \$4,000.00 a year.

The Court: Well, that is incomplete, you see. You imagined it cost you \$4,000.00 a year for what?

The Witness: For living expenses and purchases of clothing, or gas and——

The Court: How would \$125.00 sales tax be computed then?

The Witness: I can't answer that, your Honor, because I give the costs and what we had spent to the auditor, and that is the way he would compute them. I wouldn't know what we were allowed and what we weren't allowed.

The Court: You mean to say the accountant computed the [52] amount of \$125.00 sales tax?

The Witness: Whatever that income shows there, I imagine.

The Court: Did the accountant compute the amount of \$125.00, or did you? Is \$125.00 an estimate?

Mr. Reed: Mr. Sterns, is \$125.00 an estimate?

The Witness: I would imagine. I don't know. I wouldn't know about those things.

(Testimony of Cyrus Sterns.)

The Court: Did you keep receipts of sales tax, sales taxes paid?

The Witness: Well, I can't say that I did, but——

The Court: Then, I guess the \$125.00 is an estimate.

The Witness: Yes.

Mr. Reed: Yes, your Honor.

Q. (By Mr. Reed): In your return, Mr. Sterns, for 1944, you claim medical expense. That has been disallowed. A. Yes.

Mr. Reed: To save time, I ask the Court to advise me how I can expedite this, by getting these checks, all payable to the hospitals and doctors——

The Court: How many checks are there?

Mr. Reed: This group of checks here, your Honor.

The Court: You can have them all marked for identification as one exhibit, and afterwards you can offer [53] the checks in evidence. And the witness can refer to that exhibit number in his testimony. That would be 8 for identification.

(The document above referred to was marked Petitioners' Exhibit No. 8 for identification.)

The Court: Did I receive 7 in evidence, Mr. Clerk?

The Clerk: Yes, your Honor.

Mr. Burrell: May I note, your Honor, that the total amount as on the tab attached to these checks now identified is different from the amount reported

(Testimony of Cyrus Sterns.)

and claimed by the taxpayer in the report, in that it exceeds that amount by almost \$200.00.

I should also like to object to the introduction in evidence of any of those checks made payable and endorsed by individuals with no indication that they are to any doctor or hospital or any other medical expense.

The Court: How much was claimed in the return for 1944 for medical expense?

Mr. Burrell: The sum of \$1,575.00; to St. Vincent's Hospital the sum of \$781.83; to Dr. Maurice Graham the sum of \$893.25.

Mr. Reed: I believe the Petitioner will testify that the balance of the checks were payable to trained nurses.

To expedite this matter, I would be glad to stipulate the amount claimed in the return is correct. [54]

The Court: I don't think you can do that. You might say that you are not claiming any more than you claimed in the return. Is that what you mean to say?

Mr. Reed: Well, if your Honor please, I believe we are entitled to claim all of this as an expense, as a deduction.

The Court: You would have to amend your Petition to make claim for the additional deduction. If you are going to do that, then you would have to amend your Petition to conform to the proof. I didn't follow you on the figure, however. There are due \$1,575.00——

Mr. Burrell: Yes, that is the sum shown in the

(Testimony of Cyrus Sterns.)

schedule which the Petitioner attached to the return.

The Court: Then I must have gotten the figures broken down wrong; for St. Vincente's Hospital, how much?

Mr. Burrell: There is a discrepancy.

The Court: There is a discrepancy right in the return. \$781.83 hospital expense, and \$893.25 to Dr. Graham, totals \$1,675.08. And over in the margin the deduction claimed is \$1,575.00. And the discrepancy is unexplained in the return.

Now, I believe all of the deduction for medical expense was disallowed, was it, or——

Mr. Burrell: Yes, it was, your Honor. I am a bit confused. I will call to your Honor's attention, in this same [55] tax year, no tax upon himself, showing a loss, in which event he would not, according to this, which must exceed five per cent of the income shown on line 6, so he has not actually, or reported, in a sense, properly claimed any medical deduction for that year, and we have disallowed it in the 90-Day Letter.

Now, this additionally can be said: We have set up against this Petitioner an amount of income for this year which if it were found to be sustained, he would then have ample income on which the five per cent could apply and then could have those medical deductions which he can substantiate here.

The Court: Mr. Reed, you know that the statute provides the medical expense deduction is one which is allowed if the taxpayer has taxable income. Then there is a limit on the amount that can be taken.

(Testimony of Cyrus Sterns.)

Mr. Reed: Yes.

The Court: This seems to be a moot affair. If he had no income he wouldn't properly be claiming any medical expense.

Mr. Reed: But if your Honor should find there was a deficiency, he might well benefit by this deduction.

The Court: That is true. Well, how many of the checks which make up Exhibit 8 for identification are made payable to the hospital or to Dr. Graham? [56]

Mr. Burrell: Your Honor, we have made a segregation of the checks on the basis of all those checks payable to the hospital or Dr. Graham or any other doctor or optical company, as the case is here in a few of these, and Respondent is willing to stipulate that these are deductions for medical expense in the event the Court should find there is taxable income here to which the statute may apply.

The Court: Then I will ask the Clerk to mark the checks that make up the stipulation as Exhibit 9 for identification, and the remaining checks will be Exhibit 8.

(The documents above referred to were marked Petitioners' Exhibit No. 9 for identification.)

Mr. Burrell: Neither one of us at this time knows what the total amount of those checks is, but I believe——

The Court: I will find out in just a minute.

Mr. Reed, go ahead.

(Testimony of Cyrus Sterns.)

Mr. Reed: I offer into evidence Petitioners' Exhibit No. 9.

The Court: Any objection?

Mr. Burrell: No objection.

The Court: Exhibit No. 9 is received in evidence.

(The document heretofore marked Petitioners' Exhibit No. 9 was received in evidence.)

The Court: Would you look at the remaining checks to see if they bear our stamp of Exhibit 8, otherwise the [57] clerk will have to mark them again.

How did you mark those?

The Clerk: Marked them on the back of one check, so I will have to mark these again.

The Court: Yes, mark them again and cross stamp off the other.

Mr. Burrell: You are offering these additional checks?

Mr. Reed: They are already marked for identification.

The Court: Wait a minute, please.

Mr. Reed: Your Honor,—

The Court: If you will wait just a minute, please. May I see Exhibit No. 9, Mr. Clerk?

Mr. Reed, where is the check that has our stamp for Exhibit No. 8 for identification on it?

Mr. Reed: Right here, your Honor.

The Court: Where is the original? The Clerk has marked two things Exhibit 8.

The Clerk: I just put this stamp on, but I pre-

(Testimony of Cyrus Sterns.)

viously marked Exhibit 8, and I don't see that check in this bunch, your Honor.

The Court: Have you kept out a check somewhere?

Mr. Reed: No.

The Court: Here it is. I have it. I am crossing [58] out the stamp on one of the checks that is in Exhibit 9. That straightens that out.

During the recess the Clerk will add up Exhibit 9 on the adding machine tape, which we will show to counsel, and we will know what the total of those checks are.

Now, I think with respect to Exhibit 8 that you would have to ask the witness some questions before you could offer those in evidence.

Q. (By Mr. Reed): Mr. Sterns, I show you Petitioners' Exhibit for identification No. 8, and ask you if you have seen those before, and what are they?

A. These are all nurses that served me while I was in the hospital.

The Court: When was that?

The Witness: Well, that was in—I was taken to the hospital—my accident was on December 12th, I think, of '44.

The Court: What accident?

The Witness: Well, I was in an automobile accident.

The Court: What happened?

The Witness: Well, I had a brain concussion. I had both arms mashed, and I was unconscious five

(Testimony of Cyrus Sterns.)

days or six days, and they sewed me up. My whole nose was cut off—cut there. [59]

The Court: Where was the accident?

The Witness: Between Modesto and Turlock.

The Court: What hospital were you in?

The Witness: I was in the Turlock Hospital there from that morning until the following morning, when they got an ambulance and a nurse and a doctor that drove me down to St. Vincent's Hospital.

The Court: Where was that hospital, in Los Angeles?

The Witness: That is in Los Angeles at Third and, I think it is at Alvarado, or one of the streets there.

And, incidentally, while I was unconscious they robbed me of \$1,700.00—moneys that I had collected.

The Court: Anyway,—may I see those checks?

The Witness: I was incapacitated about nine months.

The Court: These checks are all signed by Mrs. Cy Sterns.

The Witness: Yes.

The Court: The bank is the Beverly Hills office of the California Bank. What kind of an account did you have in that bank in 1944?

The Witness: Well, it was—she had the right, the privilege to sign on my account, or vice versa.

The Court: Well, Mr. Reed, these checks—the witness says that he had an accident on December

(Testimony of Cyrus Sterns.)

12, 1944. Now, assuming that there are 30 days in December, that 18 [60] days in December——

The Witness: We had three nurses on it, your Honor.

The Court: You would have to explain how you could have so much owing to nurses, because you have checks here running from \$32.00 to \$64.00, and there are seven checks. And you will have to——

The Witness: Well, for a while,——

The Court: You will have to clear that up. Evidence has to be specific on all these matters.

Q. (By Mr. Reed): How much were these nurses paid for each shift?

A. I think at that time either \$8.00 or \$9.00 per shift.

The Court: What? What does “shift” mean?

The Witness: Eight hours.

The Court: All right.

The Witness: For a while I had three nurses a day to cover the 24 hours while I was unconscious.

Mr. Reed: I haven't totaled these, your Honor.

The Court: Those are things you have to do.

Mr. Reed: I offer these checks, marked Petitioners, Exhibit 8.

The Court: How much do they come to, Mr. Reed, before you offer them? Take a minute to add those up on the six checks. Are they all made payable to the same payee? [61]

Mr. Reed: No, your Honor.

The Court: Are they all different payees?

Mr. Reed: No.

(Testimony of Cyrus Sterns.)

The Court: Do you have two checks to one person?

Mr. Reed: There are two checks to each, to two persons and three checks to one person.

The Court: Well then, add it up that way.

Mr. Reed: On varying amounts.

The Court: All right.

Mr. Reed: \$302.00.

The Court: Is that the total?

Mr. Reed: Total.

The Court: What is the breakdown of that? How much is paid to whom?

Mr. Reed: To Agnes Connelly, \$64.00. To Anna Petersen, \$32.00. To Marie Cole, \$120.00. And \$136.00 to Nellie C. Wynn.

I offer these checks as Petitioners' Exhibit No. 8, now marked Petitioners' Exhibit for identification No. 8.

The Court: State your objection.

Mr. Burrell: If your Honor please, Respondent does object to the receipt of these medical expenses, on the following ground: The Petitioner's original return shows medical expense claim reported and claims the sum of \$1,575.00 and totals from two entries, St. Vincente's Hospital and Dr. [62] Maurice Graham. In his amendment filed at a later time there is an addition of eight cents.

His Petition filed in this proceeding, and his statement, Paragraph 5, states that Petitioner paid in 1944 \$1,575.00 for medical, and there is no claim in

(Testimony of Cyrus Sterns.)

the return for this sum. I believe he should make an issue of this if he wants to claim them.

Mr. Reed: Your Honor, I move that the Petition filed be amended—the filed amended return be made to conform to the proof.

The Court: What do those checks add up to, \$352.00? I believe those checks add up to \$352.00.

Mr. Reed: That is correct, your Honor. I was in error with \$302.00.

The Court: You are now claiming deduction for the nursing expense of \$352.00. You wish to amend your Petition to that effect?

Mr. Reed: Yes.

The Court: The motion to amend the Petition is granted. You must file a written amendment to your Petition later.

The checks are received in evidence as Exhibit 8.

(The documents heretofore marked Petitioners' Exhibit No. 8 were received in evidence.) [63]

Q. (By Mr. Reed): Mr. Sterns, in the accident that you mentioned in 1944, who was driving that car?

A. Chauffeur was driving it.

Q. Why did you have a chauffeur?

A. I had fibrinous thrombosis in my left leg; blood clot.

Q. I believe you previously testified that you terminated your business with South Pacific Company prior to this time.

(Testimony of Cyrus Sterns.)

A. Well, our business was terminated, I think July 25th.

The Court: What year?

The Witness: '44.

Q. (By Mr. Reed): Were you offered a job at that time?

A. I was offered a job by Mr. Syracuse in his winery to go out and sell, but I wasn't physically fit.

Q. Who is Mr. Syracuse?

A. Owner of the South Pacific Wholesale Liquor Company.

Q. Did you accept the job?

A. No, I couldn't.

Q. Why? A. I wasn't physically able to.

Q. Since 1944 have you had substantial medical expense? A. Since 1944? [64]

Q. Yes.

A. I have had medical expenses every year since probably '39 or '40, or long before that.

Q. Have you been in the hospital recently?

A. I was in the hospital in May of '53.

Q. What hospital?

A. I was first taken unconscious—I was taken unconscious to Cedars of Lebanon, and they advised my doctor that the examination and one thing and another would cost several thousand dollars, and not having it they removed me to the General Hospital.

Q. What is the General Hospital?

A. That's the County Hospital.

Q. I see. Did you pay your bill there?

(Testimony of Cyrus Sterns.)

A. No.

Q. You mean that is—— A. I owe it.

Q. I see.

A. I was there 11 days, and was unconscious for 11 days.

The Court: How much more will the direct examination of Mr. Sterns take?

Mr. Reed: Very few minutes, your Honor.

The Court: We will complete that, and then recess for lunch for an hour. [65]

Mr. Reed: Will the Clerk please mark these for identification?

The Clerk: Exhibit 10 for identification.

(The document above referred to was marked Petitioners' Exhibit No. 10 for identification.)

The Court: The Clerk has added up the checks in Exhibit No. 9, and the total—if you would like to put this down, please—Exhibit 9, \$1,404.14. Those are checks of varying amounts made to St. Vincente's Hospital, Dr. Graham, Alvarado Hospital, Dr. Bowen, and others.

Q. (By Mr. Reed): Mr. Sterns, I show you Petitioners' Exhibit marked for identification No. 10, and ask you what they are.

A. They are checks made payable to the Collector of Internal Revenue for—some of them are '43, September 15, '43, and some of them are in '44.

Q. Whose checks are they, and what were they for?

A. Well, they are for—I have my income return for 1943.

(Testimony of Cyrus Sterns.)

Q. Did you file an estimate for 1944?

A. Well, I don't know if I did or not.

Q. Some of those checks are dated in 1944.

A. That was paid quarterly for the 1944 income; March 14th, June 14th, '44.

Q. Mr. Sterns, your 1943 return discloses a tax [66] liability of \$1,472.23. Do you find a check for that amount there? A. \$1,472.23.

Q. In 1944—your 1944 return discloses a tax liability of no tax due, but the 1944 declaration of estimated tax is \$1,050.00. Could it be that those 1944 checks were paid on your 1944 estimated tax liability? A. Could be. I wouldn't—

The Court: What do the checks add up to?

The Witness: They add up to—I have one check for \$1,472.23. Do you want to add this, Mr. Reed, please?

Mr. Reed: Yes.

The Court: Apparently there is one check for \$1,472.23. You can leave that out because that was explained. Right?

Mr. Reed: Yes, your Honor. These checks total \$2,117.93, payable to the Collector of Internal Revenue.

The Court: His declaration made in estimated tax is \$1,050.00.

Mr. Reed: \$1,050.00. There is some confusion.

The Court: There is something unexplained, isn't there?

Mr. Reed: Yes, there is, your Honor.

The Court: Why don't you pass that and see if the [67] accountant can explain that?

Mr. Reed: All right. No further questions of Mr. Sterns.

Mr. Burrell: Were these introduced? I know you had these identified.

The Court: No, they were just identified. I think that perhaps that can be cleared up later.

How many witnesses have you, Mr. Reed?

Mr. Reed: Three more.

The Court: Three more in addition to Mr. Sterns?

Mr. Reed: But they will not be lengthy witnesses, your Honor.

The Court: Mr. Burrell, you have called some witnesses?

Mr. Burrell: Yes, your Honor, I have three witnesses here, in addition to the agent.

The Court: The witnesses are in the courtroom. I want to tell the witnesses that the trial of this case will extend beyond today, and we will sit until 5:00 o'clock, or 5:15. It will be necessary for you to be in court. No doubt we won't finish today. We may finish by noon tomorrow. After a witness has testified the Court probably will be able to excuse the witness, if the attorney who called you as a witness doesn't require that you be here all of the time, it is agreeable to the Court to have the attorney [68] excuse a witness for an hour or so. These people perhaps have other things that they would like to do.

Now, as far as the Court is concerned, they don't

have to be here, but they must report when they will be needed to testify.

We will recess now until 2:00 o'clock.

(Whereupon, at 12:15 p.m., a recess was taken until 2:00 p.m. of the same day.) [69]

The Court: Will you take the stand, please, Mr. Sterns?

Whereupon,

CYRUS STERNS

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Reed: If your Honor please, when we adjourned this morning we were discussing the checks that Mr. Sterns had transferred to the Bureau of Internal Revenue in payment of his estimates for 1943 and 1944. During the recess Mr. Burrell and I have discussed it, and I believe that he will stipulate that these payments were received in 1943 in the amounts of \$332.00 and \$568.00.

Mr. Burrell: If I may, your Honor, I believe I can kind of help Mr. Reed in this regard. In the 1943 return of the Petitioner it shows that he paid, with his filing of the return, the sum of \$1,472.23. That was explained upon the Petitioner's testimony to one check in that amount having been payable and collected by the Internal Revenue Department. Now, the return indicates that his balance of tax due after the sum of \$900.00 has been paid during the year.

The two checks which Mr. Reed read into the record do total, I believe, \$900.00. [70]

(Testimony of Cyrus Sterns.)

So the Respondent is in a position to stipulate that the taxpayer Mr. Sterns did pay more than the requirement upon the liability of 1943, the sum total of—would be a total——

The Court: \$2,372.23.

Mr. Burrell: Correct, your Honor; and Respondent so stipulates.

Mr. Reed: In regards to 1944, the amount of \$525.00 was remitted on April 15, 1944, and \$525.00 on June 14, 1944, all in payment of the 1944 estimate; total amount of \$1,050.00.

Mr. Burrell: Respondent so stipulates, your Honor, with making this notation. The original return of Mr. Sterns, as well as his amended return for the taxable year 1944 both have a request that this sum of \$1,050.00 be credited on his 1945 estimated tax, and inasmuch as his return for the year '44 shows no tax due or payable, it is to be presumed that the Commissioner has done just that.

Mr. Reed: These checks are offered, Petitioners' Exhibit 10, into evidence.

The Court: With that explanation, I think they can be received.

Mr. Burrell: Yes.

The Court: Received in evidence as Exhibit 10.

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 10. [71])

Direct Examination—(Continued)

Q. (By Mr. Reed): Mr. Sterns, did you receive

(Testimony of Cyrus Sterns.)

a refund from the Bureau of Internal Revenue on account of your 1944 payment of \$1,050.00?

A. No, I did not.

Q. Did you have a net income in 1945 that you owe tax upon? A. No, I didn't.

Q. Therefore, you never have received the benefit of that overpayment of the 1944 tax of \$1,050.00?

A. No, I haven't.

Mr. Reed: That is all.

The Court: You don't know whether he has filed the claim for refund.

Mr. Reed: Have you filed a claim for refund for 1944?

The Witness: I wouldn't know.

Mr. Reed: I believe, your Honor, in our Petition we prayed for an overassessment for both years, 1943 and 1944.

The Court: On that matter, Mr. Reed, you know that we have no jurisdiction over collections or for refunds. All that we can do is to say in the decision that some part of a tax deficiency has been overpaid. I don't know how that [72] will work out in this case. That covers the matter, and I will find out later what I can do with that.

You may inquire, Mr. Burrell. Are you finished, Mr. Reed?

Mr. Reed: Yes. Thank you.

Cross Examination

Q. (By Mr. Burrell): Mr. Sterns, I hand you Exhibits 3-C, 4-D and 5-E, which are your individ-

(Testimony of Cyrus Sterns.)

ual tax returns for the year 1944, 1943 and 1944, including your amended return for 1944, and ask you to look at them.

I would like to ask you now whether your return that you filed for the 1943 is correct as filed. Does that accurately and truthfully declare and report your income and your deductions for that year?

A. To the best of my knowledge and belief, it is.

Q. And directing your attention to your original and amended return for the year 1944, does that return accurately and truthfully report your income and deductions for that year?

A. To the best of my knowledge and belief, it is.

Q. Now, in these returns for those two years you have reported certain income. What is the source of that income?

A. In which two years?

Q. 1943. What is the source of your income for 1943, [73] as reported in those returns?

A. From the sale of liquor.

Q. From whom did you receive this income that you are reporting in your return?

A. From the South Pacific Wholesale Company.

Q. Is that the only source?

A. With the exception of where I stated I got \$2.00 a case over on about 900 cases in the San Francisco area through one of the salesmen.

Q. And that would be a sum total of how much?

A. About \$1,800.00 or \$2,000.00.

Q. Does that represent so-called blackmarket income, Mr. Sterns?

(Testimony of Cyrus Sterns.)

A. You could call it that.

Q. Is that a fair characterization of that income?

A. Possibly, yes.

Q. You say that that amount is \$1,800.00 to \$2,000.00?

A. About that.

Q. My notes indicate that upon your examination you testified that you had received total over ceiling receipts of \$4,000.00 to \$5,000.00.

A. That was in 1944.

Q. I see. Then it is your testimony that you received blackmarket income in the year 1943 in the approximate amount of \$1,800.00 to \$2,000.00? [74]

A. Approximately.

Q. And in the year 1944 of \$4,000.00 to \$5,000.00?

A. May I-----

Q. I would rather you answer my questions.

A. I would like to elaborate on that, if you don't mind.

Q. That is all right.

A. I represented a fellow who is connected with Hannack Distillers, who had chased me all over the state three different times promising to give me merchandise. Finally, he came along with a deal that was to be billed at \$39.00. But they wanted \$10.00 overage or in excess of the ceiling price.

I sold that merchandise, I sold about—at the time of my trial in San Francisco, I recall I sold 250 cases, that I could remember.

But there was one concern in San Luis Obispo, I think it was, that gave me some money and they never got any merchandise. I had paid these people

(Testimony of Cyrus Sterns.)

I think \$10,000.00, a little bit over \$10,000.00 for a thousand cases. As I say, they delivered about 400 cases, and on my way back, that was the time when I had this automobile accident, and I was robbed of most of the money, about \$1,700.00, and they still owed me \$6,800.00. I made about \$4,000.00. They owed me \$6,800.00.

And when I got well enough to have them come over and see me, I said, "Say, listen, you only delivered 400 cases. You were supposed to deliver a thousand." [75]

They said, "Take your best shot. That is all you are getting. That is the total."

Instead of making \$4,000.00 I lost \$2,800.00. Now, that is as far as I went in the blackmarket.

Q. I see. Mr. Sterns, you were served with a subpoena in this case at the request of the Respondent, were you not?

A. I don't know. I was served with a subpoena, yes.

Q. That was at the request of the Respondent. I would like to state, naturally, that you were not served for the purpose of making you our witness, but for the purpose of your being in court only—a subpoena duces tecum to ask you to bring into the court a record of your income and deductions for the two years involved herein. Have you done that?

A. Yes.

Q. Can you state for me—and if it is necessary to have your memory refreshed, look at certain documents—can you state the income you received for

(Testimony of Cyrus Sterns.)

each of the two years, 1943 and 1944, from South Pacific Wholesale Company?

A. Well, I can't give it to you to the penny without first—I think about a gross of \$26,000.00; then after deducting my allowable expenses and so forth, I think the net was about \$14,000.00 in '43.

Q. How much net taxable is reported in your 1943 return? [76] A. Whatever that was.

Q. I hand you your return. You may refer to it.

A. I think—was there amended something to this? Amended something?

Q. I don't believe that your 1943 return was amended, Mr. Sterns. Your 1944 return was.

A. There's "Amended."

Q. I see.

A. All I had to go by is what they gave me, a statement showing, I think, \$26,000.00, if I remember correctly.

Q. What do you show in your 1943 return as your receipt from South Pacific Wholesale Company, Mr. Sterns?

A. Yes, but I earned this money from Greski and earned from some——

Q. Read it.

A. \$14,887.00; Greski Company, \$2,380.00, and Von Runkel, \$480.00.

Q. Does that comprise your entire taxable income for the year 1943? A. I would say so.

Q. A few minutes ago you testified that in 1943 you received——

A. I think I saw an article where I saw it \$26.-

(Testimony of Cyrus Sterns.)

000.00. I didn't take out the deductions. And I said about \$14,000.00 net taxable. [77]

Q. Can you point out, Mr. Sterns, where in your return you have reported the blackmarket receipts that you have already testified that you received in 1943? Does that show in your return?

A. My expenses would more than offset that; somewhere, I don't know where.

Q. Are you referring now to expenses which show in your return or which do not show in your return? A. I wouldn't know one or the other.

Q. I hand you your return, your original amended return for the year 1944, and ask you to point and read the amount of net taxable income that you received from South Pacific Wholesale Company in that year?

A. I wouldn't know without looking at — of course, they wouldn't know what my losses—they wouldn't know what my expenses——

Q. I am asking you to point out what is in your return.

The Court: You mean by "they"——

The Witness: South Pacific wouldn't know what my expenses were, who I paid for deposit for merchandise.

The Court: That isn't the point, Mr. Sterns. The point is this: You are required to make up your return in a certain way. You testified that you had an accountant make up your return, is that right?

The Witness: That is **right**.

The Court: What was his name?

(Testimony of Cyrus Sterns.)

The Witness: Cy Tanner.

The Court: Mr. Tanner is the person who is supposed to have made up your return with all the details, not the South Pacific Liquor Company?

The Witness: He took them from memorandums that I had given to him, and I hadn't kept any books, due to the fact I was expecting to get—I was operating through the South Pacific Company, and their records and so forth, the records that I went by. They said I delivered 13,000 cases. They take off \$2.00 a case and the difference I got. That is what it amounted to.

The Court: You mean in making up this return, net figures were put down instead of gross figures and then——

The Witness: No, they give me an example, say, \$26,868.00——

Mr. Burrell: What are you reading from?

The Witness: Right here.

Mr. Burrell: You are reading from what?

The Witness: Cy Tanner's statement.

The Court: 1944 return or——

The Witness: 1943.

Mr. Burrell: Schedule attached to your '44 tax return, is it not? [79]

The Witness: '44 or '43, I don't know. '44.

Mr. Burrell: Do you wish me to proceed, your Honor?

The Court: Yes.

Q. (By Mr. Burrell): You have just read commissions in the amount of \$26,868.82 from your 1944

(Testimony of Cyrus Sterns.)

return. From whom did you receive those commissions? A. I got those from South Pacific.

Q. Does your return indicate any other receipt of taxable income?

A. I wouldn't know.

Q. Well, read your own schedule, Mr. Sterns. Did you?

A. I didn't make that schedule out.

Q. You signed this return, didn't you?

A. Yes, I signed it to be correct. I am not an auditor.

Q. Inspect it, Mr. Sterns. Does it show any other entry which could be reasonably construed as income?

A. It may be included. I don't know if they included in there—I don't know what I got from South Pacific. I don't—I may have said I got \$3,000.00 or \$4,000.00; made \$3,000.00 or \$4,000.00 extra, and had——

Q. Do you understand my question?

A. Yes.

Q. But you are unable to answer it?

A. That is right. [80]

Q. You have testified, according to your own testimony, that during the year 1944 you had black-market receipts of \$4,000.00 to \$5,000.00. Are those blackmarket receipts in your return?

A. No, because they are not receipts; loss instead of a receipt. It was a loss.

Q. All right.

A. If I collect \$4,000.00 and lose \$6,800.00, I don't have any income. I had a loss.

(Testimony of Cyrus Sterns.)

Q. Does your return for 1944 include any black-market receipts for income?

A. I don't know. I would not know. After all, it is ten years, and I certainly—I am not trying to evade the answer, either.

Q. During the year 1944 did you sell any whiskey at over the OPA legal maximum?

A. I just told you about this incident here, wherein I sold about 400—I am even possibly going over the amount, because I have no accurate way of checking. These people had even given me \$1,200.00 as a deposit. I have a letter from them and a letter from their attorney where they received the money, and I didn't know whether these other people had sent them any whiskey. That is the time I was on my way back and in that automobile accident.

Q. Did you during the year 1944, and to be exact, on or [81] about February 21, 1944, sell to one A. W. Jensen 100 cases of Rocky Springs blended whiskey at a price of \$60.00 per case, at which time and place the legal maximum for that liquor was \$29.65 a case?

A. In February '44?

Q. Yes.

A. February '44—was not sold through me, that I know of.

The Court: What was the legal maximum?

Mr. Burrell: My question was intended to give the price of \$29.65 per case.

Q. (By Mr. Burrell): Were you convicted of a

(Testimony of Cyrus Sterns.)

crime in the Southern Division of the United States District Court for the Northern Division of California on October 17, 1946, for willfully and knowingly selling 100 cases, containing 12 bottles each, of Rocky Springs blended whiskey to one A. W. Jensen, at \$65.00 a case, when the legal maximum for said whiskey was \$29.65 per case?

A. I don't remember that accusation at that time. There was an affidavit made by the man who sold the whiskey, not me.

Q. In February 1944 did you have a salesman employed by you by the name of Harry Lewis?

A. Yes, and Friedland. [82]

Q. Both employed by you as salesmen at that time?

A. In '44, February? I would say yes.

Mr. Burrell: Your Honor, I should like to introduce at this time a certified copy, certified by the clerk of the appropriate court of the judgment and conviction of the Petitioner Mr. Sterns for violation against the Emergency Price Control Act of 1942, as amended, and in substance, what I have just previously read into the record.

The Witness: I did not deny that.

Mr. Burrell: I offer it.

The Witness: I was convicted as a misdemeanor and fined \$500.00—only conviction I ever had, if that is a conviction. And I didn't get that money.

Mr. Burrell: There is the offer.

The Court: Any objection?

Mr. Reed: No objection.

(Testimony of Cyrus Sterns.)

The Court: Received in evidence as Exhibit F.

(The document above referred to was received in evidence and marked Respondent's Exhibit F.)

Q. (By Mr. Burrell): Did you keep books of account of the business that you did for the years 1943 and 1944?

A. No, I didn't keep the books. I kept memorandums.

Q. Are these memorandums sufficient to detail and complete so as to properly reflect your income and deductions [83] for those years?

A. Well, that is what the auditors worked on, from the records that I gave them.

Q. Do you have those records in court with you?

A. Some of them. I tried to go over some of them myself and I can't figure out what they are.

Mr. Burrell: Will you produce them at this time, please? I may be noted, your Honor,—I believe I may have mentioned this—the subpoena was served on Mr. Sterns to produce records of this sort.

The Witness: All the records and so forth are with the auditors.

Q. (By Mr. Burrell): Is this the sum total of your books of account of 1943 and 1944 of your business, and other operations? A. Yes.

Mr Burrell: I should like to introduce this book as Respondent's Exhibit G.

The Court: Any objection?

Mr. Reed: No objection, your Honor.

The Court: Received in evidence as Exhibit G.

(Testimony of Cyrus Sterns.)

(The document above referred to was received in evidence and marked Respondent's Exhibit G.)

Mr. Reed: May we make that a joint exhibit?

The Court: No, it is not necessary. It would be difficult to handle our exhibit numbers that way. You could have offered it if you wanted to earlier.

Q. (By Mr. Burrell): Mr. Sterns, could you, by an inspection of the book of account, so-called, just introduced as Respondent's Exhibit G, advise the court of the amount of income and deductions which you would be allowed under the Internal Revenue Code for the years 1943 and 1944?

A. I wouldn't know.

Q. Does Respondent's Exhibit G, the so-called book of account, indicate any sales of whiskey made by you during the years 1943 and '44, in which you received blackmarket overages? A. No.

Q. They do not. Mr. Sterns, on your direct examination, you testified early in your examination that you had an arrangement for the purchase of I believe 900 cases of Baltimore Club, that you paid for and received the Baltimore Club Whiskey; is that correct? A. That is right.

Q. I should like to ask you this: Could it be that the correct number of cases of Whiskey received of the Baltimore Club brand was 618 cases?

A. No, sir.

Q. Whatever the correct number might be, were they [85] received by or billed out by South Pacific Wholesale Company?

(Testimony of Cyrus Sterns.)

A. The reason for that discrepancy——

The Court: Just a minute. Answer the question, and then you can explain it afterwards.

Read the question.

Mr. Burrell: I will make it easier.

Q. (By Mr. Burrell): Did the South Pacific Company receive any part of the Baltimore Club Whiskey to which we are now referring?

A. They received part.

Q. Do you know how much?

A. That may be around 600 cases.

Q. Would these 618 cases that they might have received been delivered by them to the retailers designated by you and invoiced from South Pacific Wholesale Company to these retailers?

A. Yes.

Q. Might South Pacific Wholesale Company paid the distiller for the 618 cases?

A. Definitely not; positively not. May I give you a little story on that?

The Court: Go ahead.

The Witness: Do you want me to explain that?

The Court: Go ahead.

The Witness: I got a letter, or got a card from [86] the Equalization Board, and I happened to be down at the Terminal. I called up, I called up some of these customers and I said, "I am going to get some whiskey today, and you meet me at the Terminal warehouse." And I called the girl and she said, "Your wholesale liquor license is here." She took for

(Testimony of Cyrus Sterns.)

granted that the sales tax card was the wholesale liquor license.

And I delivered at the warehouse about 300 cases, and told them that I would bill them the next day; that I didn't know what my license number was, and so forth.

The Court: To whom?

The Witness: To the various customers; I don't know. But the next day the Board of Equalization, or somebody, reported that I was delivering whiskey from the warehouse, and in fact, 50 cases—I don't remember the amount, 50 cases or more—went on to San Bernardino, up to beyond San Bernardino, and they never heard of me, the Board of Equalization; and they called up their local office and stopped delivery of all the other whiskey. That was how we got together with the Pacific, South Pacific Company, and the Board permitted the South Pacific Company to bill all that whiskey. That is where you get your 900 cases instead of three hundred and some cases.

Q. (By Mr. Burrell): Does that complete your explanation? [87]

A. That completes it.

Q. Mr. Sterns, of the several thousand cases of whiskey which you handled through the offices and license permit of South Pacific Wholesale Company, what proportion, percentage-wise, would have been the Rocky Springs brand that came from the distillery in Seattle? You may approximate that for our purposes.

A. You mean how many cases from—

(Testimony of Cyrus Sterns.)

Q. I have asked actually for an approximate percentage, and that will be satisfactory for the moment.

A. 90, 85, or 90—85 per cent, somewhere around in there, I would say.

The Court: I don't understand. Sorry to interrupt. You mean 90 per cent of all the whiskey you sold was Rocky Springs whiskey?

The Witness: No, your Honor. Rocky Springs, U.D.L. Bourbon, U.D.L. Straight—I presume you mean from that distillery direct?

The Court: What is your question?

Q. (By Mr. Burrell): My question is, of all the whiskey that you handled through South Pacific in these two years, what percentage would have been the brand of Rocky Springs?

A. I can't answer that.

Q. Can you approximate it? You were the man handling [88] it, Mr. Sterns.

A. I know, but, Mr. Burrell, this is ten years, and I have handled whiskeys and one thing and another.

Q. Was it a substantial proportion?

A. Yes, the greatest portion would be Rocky Springs.

Q. The greatest portion? A. That is right.

Q. That is the same whiskey referred to in Respondent's Exhibit G, is it, the conviction with respect to which you were convicted of OPA violation—F, excuse me. A. Yes, I think so.

Q. Could you tell us how much the Rocky

(Testimony of Cyrus Sterns.)

Springs brand cost per case from the distillers? That is, the cost to South Pacific Wholesale Company?

A. I can't tell you that. We have the invoices.

Q. Would it have been the same cost through the two years, or—— A. No, sir.

Q. ——would it vary? The same brand varied?

A. Definitely.

Q. Within what price ranges?

A. Oh, \$4.00 or \$5.00,——

Q. Can you give us those figures?

A. I couldn't give them to you. I would have to have the invoices. I think Mr. Radke could give you those figures. [89]

Mr. Burrell: I would like to have this figure, your Honor, and I am perfectly willing——

The Court: Would you please produce the invoices?

Mr. Burrell: I don't know any exact figure or—I only want figures to work on.

Q. (By Mr. Burrell): Mr. Sterns, I hand you what purports to be a 1943 invoice from Old Monastery Company, which comes from your attorney's records, indicating the purchase by South Pacific Wholesale Company from a distillery of 1,500 cases of Rocky Springs Blended Whiskey at the unit price of \$23.58 per case.

Have I read this correctly?

A. You have read that correctly, but that is not the price of the whiskey.

(Testimony of Cyrus Sterns.)

Q. What would be the price of the whiskey that you have in mind?

A. That would be \$23.58, \$1.00 for freight, \$1.92 state tax, \$2.00——

Q. What is the \$2.00 for?

A. Clearing cost.

Q. To whom is that paid?

A. South Pacific.

Q. You mean you are paying to South Pacific?

A. That is right.

Q. My question to you has been this: What was the [90] cost to South Pacific?

A. South Pacific had nothing to do with the cost. I am giving you the cost of the merchandise.

The Court: Whose invoice is that, Mr. Burrell? What is the printing on the top of the invoice?

Mr. Burrell: "Old Monastery." To South Pacific.

The Court: Therefore, that would be, Mr. Sterns, what Old Monastery was charging South Pacific.

The Witness: But then there is additional charges.

The Court: We have to take one thing at a time, as I warned you before. If South Pacific is then going to charge you something——

The Witness: That is the price from the distillery.

Mr. Burrell: That is what I wanted.

The Court: It is possible, Mr. Burrell, that the shipper would include freight charges.

Mr. Burrell: I assume somebody had to pay them.

(Testimony of Cyrus Sterns.)

The Witness: I paid them, charged to my——

Mr. Burrell: I believe the line of questioning I have in mind can be put properly into the record without going into that, and I will attempt to, with your permission, go to another line.

Q. (By Mr. Burrell): Your arrangement in brief—this is in the stipulation of facts and also in your testimony—your arrangement [91] with South Pacific Wholesale Company was this: That in consideration of your paying them \$2.00 per case, which was the only consideration they received for this service; that they would have and receive the 15 per cent mark-up allowance, OPA regulation, on this cost; that out of that they would pay expenses, such as freight, taxes, et cetera, and account to you for the difference. Is that not correct?

A. All charges—it may answer the same thing, but all the charges were added to the cost, and then they would take \$2.00 for the clearance.

Q. Where was your profit then? Was it not in the 15 per cent legally allowed mark-up?

A. That is correct.

Q. And offsetting against that would be expenses such as taxes, freight and so on——

A. That is correct.

Mr. Burrell: Is that clear, your Honor?

The Court: How do you tie it in, Mr. Burrell, with the cost per case on the invoice?

Mr. Burrell: South Pacific Company, for example, would take this cost——

The Court: How much is that? \$23.58 per case,

(Testimony of Cyrus Sterns.)

they could mark that price up without respect to taxes, freight, et cetera; could mark that up 15 per cent?

The Witness: Plus—— [92]

The Court: Wait a minute. 15 per cent mark-up is the first thing. All right. That is added to \$23.58. Plus what?

The Witness: Plus \$1.00 freight, plus \$1.92 state tax,——

The Court: Supposing you wait a minute. Mr. Burrell, would you go ahead? 15 per cent mark-up.

Q. (By Mr. Burrell): By adding these basic costs of the South Pacific Company, we arrive at the price this liquor was sold to the retailer, the ultimate purchase price of the purchaser from South Pacific. The only margin of profit involved in each case is the 15 per cent mark-up——

A. That is right.

Q. ——which South Pacific Wholesale Company had to account to you.

A. That is right.

Q. Roughly, how much is 15 per cent of \$23.58, Mr. Sterns? Is it not approximately \$3.50?

A. About that.

Q. So out of this \$3.50 on which you must conduct your business at a profit, if at all, you are going to pay \$2.00 to South Pacific, their fee, is that correct?

A. On that particular merchandise.

Q. Yes. That leaves you now \$1.50 on which to operate. [93]

A. That is correct.

Q. How much did you pay your salesmen?

(Testimony of Cyrus Sterns.)

A. \$1.00 a case.

Q. That leaves you 50 cents. How much were your office expenses for doing this business?

A. I would have to again—I have an audit that will give us all our expenses, but I think—you are picking the lowest price merchandise.

Q. It is your invoice, not mine.

A. That is right.

Q. Let's stick with that just for a moment. Even if we take a higher one we would come up with the——

A. Then the average runs more per case.

Q. Could you possible have operated this business at a profit on the basis of that 1,500 cases to which we just referred?

A. You don't just operate a business on one particular invoice.

Q. That is 1,500 cases.

A. I don't care if it is 27,000 cases; you just don't operate a business on one particular priced merchandise. A lot of people give merchandise away in order to build up a business.

The Court: Counsel asked you a few minutes ago if the Rocky Springs whiskey, what percentage of all the whiskey [94] handled by South Pacific was Rocky Springs whiskey, and you said that most of it was.

The Witness: Most of it ran \$44.00 a case, with your additional costs.

Mr. Burrell: I am going to give you a chance to correct your testimony.

(Testimony of Cyrus Sterns.)

But if the margin were larger, because the cost per case were larger, since those various handling charges are fixed charges, then his margin goes up as the cost per case of liquor handled increases.

Now, am I correct in my understanding?

Mr. Burrell: Yes, I believe you are, your Honor.

The Court: I believe, instead of asking him to rely on his memory, and instead of his arguing about it, the best thing to do is right now look at the invoices.

Mr. Burrell: If need be, we will put them in the record. I had hoped there would be a schedule which would make it easier for you and easier for me.

The Court: Mr. Reed can assist you at this time. [97]

Mr. Burrell: May we have about a two-minute recess?

The Court: We may. It will shorten the time eventually, Mr. Burrell and Mr. Reed. The reason for my making these inquiries, in the long run, it reduces the time that I have to give to decide the case. So this is all in the interest of expediting everything. We will take a few minutes' recess.

(Short recess taken.)

Mr. Burrell: Mr. Sterns may resume the witness stand, but I believe for a moment Mr. Reed and I can, by stipulation and introduction of documents, clear the record on the line of testimony that I have been attempting to elicit for some minutes before the recess.

The Court: Very good.

(Testimony of Cyrus Sterns.)

Mr. Burrell: First of all, Mr. Reed has some computations and lists which have been prepared under his direction showing the invoices and breaking them down as to type of brand, number of cases, and amount of money involved. These were actually prepared by Mr. Reed, so it probably would be more appropriate if he introduced them as his exhibits.

The Court: I would rather have you do it, if you don't mind, Mr. Reed.

Mr. Reed: Yes. I ask the Clerk to mark these as Petitioners' exhibits for identification. [98]

The Clerk: Exhibits Nos. 11 and 12, for identification.

(The documents above referred to were marked Petitioners' Exhibits Nos. 11 and 12 for identification.)

Mr. Reed: If your Honor please, I move that these exhibits be admitted as Petitioners' Exhibits in evidence Nos. 11 and 12. They are schedules prepared by an expert, and they itemize the invoices, the sales and expenses of Cy Sterns in his transactions with South Pacific, and many of his other transactions outside of South Pacific.

The Court: Those are received in evidence as 11 and 12.

(The documents heretofore marked Petitioners' Exhibits Nos. 11 and 12 were received in evidence.)

The Clerk: 13 and 14 for identification.

(Testimony of Cyrus Sterns.)

sale Company of \$23.58, the identical figure that we discussed earlier with Mr. Sterns on the witness stand, and which last purchase of Rocky Springs, I believe, was in the amount of \$30.07 per unit case.

Is that correct, Mr. Reed? You have the figure before you. [101]

The Court: I do not see in Exhibits 11 and 12 precisely the analysis which you have just stated for the record. It doesn't appear anywhere in that precise way, does it, as a summary?

Mr. Burrell: The total figures do not appear, no, your Honor. We have totaled them ourselves during the recess, and that is why I called on Mr. Reed to stipulate the total figures. Is that what you are referring to?

The Court: Yes, because I—for example, page 14.

Mr. Burrell: Of 11, your Honor?

The Court: Of 11. It shows cases bought from Platt, Monastery, Dunbar, and U. D. L., with additional—this is just as shown by books of South Pacific. It would be necessary to total the net number of cases bought, net after breakage. Then there is a cost for loss of cases, for instance, 1,000 cases less breakage. You would have to divide the number of cases net into the total cost net in order to get unit cost per case.

Mr. Burrell: Yes.

The Court: Now, how do you get a cost per case of \$23.58? Do you find that on the invoices?

Mr. Burrell: Yes, your Honor, on the invoices

(Testimony of Cyrus Sterns.)

introduced as Petitioners' Exhibits Nos. 13 and 14; and in addition, during the recess Mr. Reed and his people made the divisions necessary and penciled the amounts down on our [102] copy, which I should have advised your Honor. Is there some way that it——

The Court: You can have the Court's copy back and conform the Court's copy with your copy. Mr. Reed denies that the unit cost was \$23.50 a case. Mr. Reed?

Mr. Reed: Yes, I do.

The Court: Mr. Sterns, I mean.

Mr. Reed: Mr. Sterns.

The Court: Mr. Sterns here on the witness stand seems to deny that the cost was \$23.50 a case.

Mr. Reed: We have one invoice, \$30.07 a case.

The Court: Well,——

Mr. Reed: 2,000 cases here.

The Court: ——it might save some time to have Mr. Sterns step down and have him actually look at the invoices. I don't want the thing in doubt. This seems to be a matter that can actually be proved, and I want you to stipulate, if you can, something that will indicate whether the cost per case of liquor was very much more than \$23.50 in some instances, and the volume of merchandise where the cost was more than \$23.50.

Mr. Burrell: The penciled corrections that Mr. Radke is making now for your Honor will show that precisely.

The Court: Very well.

(Testimony of Cyrus Sterns.)

Mr. Burrell: However, I believe that Mr. Reed [103] stipulated earlier, and if he didn't, I am sure he will now, that of the ninety-three hundred some odd cases of Rocky Springs purchased and handled by South Pacific to the account of Mr. Sterns, all of it was at the unit cost per case to South Pacific of \$23.58, except the very last delivery of, I believe, 2,000 cases——

Mr. Reed: Yes.

Mr. Burrell: ——which were at the unit cost of \$30.07.

The Court: Do you so stipulate, Mr. Reed?

Mr. Reed: Yes, ma'am.

Mr. Burrell: Inasmuch as that is over 70 per cent of the activity of Mr. Sterns, my line of testimony was directed at the certain thing, which I am sure your Honor was aware of. I don't for my purposes, have any more—I think nothing more need be said about it. I am sure it is clear in this record what I was trying to get at.

The Court: Yes, I think it now is.

Mr. Burrell: Are we ready to proceed, your Honor?

The Court: We are.

Mr. Burrell: Thank you.

Q. (By Mr. Burrell): Mr. Sterns, do you know a Mr. Robert E. McClain, formerly of San Bernardino, California?

A. McClain? His name is familiar. I can't place him. [104]

Q. Can you testify whether or not you contacted

(Testimony of Cyrus Sterns.)

Mr. McClain at his place of business at 469 Third Stree, San Bernardino, California, sometime in September or October, 1943, offering at that time to sell him 100 cases of whiskey at \$52.50 a case?

A. I don't remember whether that is the right person or not. I remember making a call—I think I was introduced to him by a fellow by the name of Rosy Henderson, if that is the one. It's been——

Q. If that is the one, did you sell him any whiskey? A. I sold him some whiskey.

Q. How much?

A. I don't remember. I would have to look at our invoice.

Q. Do you know the price?

A. The price was whatever he bought it for, \$29.00, \$32.00 or \$44.00, whatever it was.

Q. You mean the OPA maximum, no more?

A. That is right.

Q. Did you accept from him any blackmarket overage? A. No, I did not.

Q. Was the whiskey which you may have sold to him and may have delivered to him from South Pacific, invoiced to him directly from South Pacific Wholesale Company?

A. It was, with the exception—I delivered to him [105] at the Sycamore Inn—if that's the man I think it is—35 or 40 cases of Grandad, Old Taylor, some Harper's Scotch that I purchased in the open market for him.

Q. Are you finished, Mr. Sterns? A. Yes.

(Testimony of Cyrus Sterns.)

Q. Did you receive and deposit in your bank account any moneys from Mr. McClain?

A. Yes, yes.

Q. For what purpose?

A. For the purpose of paying for the whiskey that I delivered to him.

Q. It is your testimony, is it, that he paid you the OPA ceiling price, and no more, for the whiskey which you ultimately delivered to him?

A. In fact, it was Rosie Henderson who sold him the whiskey to start with. And after I had shipped him some whiskey—in fact, if I remember, the man, he went East to try to get whiskey for himself, so his wife said, and then he called me. And, in fact, I met him one night over at Lyman's, and he came over to me that night and said he had to have some bar whiskey, and that is when I delivered 35 or 40 cases of whiskey to him, in the presence of Mr. Henderson. They call him Rosie; owned the Sycamore Inn.

Q. Do you have the man identified in your mind now? You are quite certain of whom you are talking about? [106]

A. If that is the fellow. I only sold one party in San Bernardino that I can recall.

Q. Are you quite certain that you did not accept and receive from him any blackmarket overage?

A. I did not.

Q. Do you know the amount of money you did receive from him?

A. No, I wouldn't remember at this time.

(Testimony of Cyrus Sterns.)

Q. Did you account to South Pacific Wholesale Company for all the money he did pay to you, whatever the amount might have been?

A. South Pacific had nothing to do with merchandise that I——

Q. You mean you sold it directly on your own without going through South Pacific?

A. That is right.

Q. Did you at that time have a federal license to——

A. I did not.

Q. Wouldn't that be illegal?

A. I acted as an agent. You can give me money, and I can go out to a retail store——

Q. This is not whiskey that was delivered either to you or South Pacific from a manufacturer?

A. No. I went out to retail stores and bought whiskey.

Q. Do you think there is a chance that you are referring [107] to some other person than I am, Mr. Sterns; Robert E. McClain, San Bernardino, California?

A. Is that the man that was back East? Did he go back East to buy whiskey?

Q. Not to my knowledge, sir.

A. If that is the man, that is Robert McClain.

Q. Let's pass that one. Do you know a Mr. Luther J. Smith, or did you in 1943, the proprietor of the DeAnza Cafe at 5007 Melrose Avenue, Los Angeles? Did you know that gentleman?

A. I have a little memorandum there. May I

(Testimony of Cyrus Sterns.)

have that, in front of Mr. Radke; my writing there. That is it. J. Smith?

Q. Luther J.

A. Well, I have a J. Smith that bought six cases of liquor, late in delivery. Meantime he sold his place. We delivered six cases, and refunded his deposit.

Q. You have referred to "his place." What is the name? A. I don't have it on there.

Q. Are you certain we are now referring to the same gentleman?

A. I have another B.M. Smith.

Q. You don't know of your own knowledge to whom I am referring?

The Court: We have got to get together on this to [108] some extent. If you have some other records down on the counsel table, you can step down and get them.

The Witness: Is the man in court?

Q. (By Mr. Burrell): The man is in court.

A. Is that the gentleman in the blue suit? That is the man I am talking about.

Q. That is Luther J. Smith. A. Yes.

Q. Did you sell him any whiskey in 1943?

A. Six cases.

Q. What brand? A. Rocky Springs.

Q. Did he pay any money to you personally and directly in respect to that purchase?

A. I don't remember. No, I don't think he did pay me directly; however, I handled him.

Q. If he didn't pay you directly, what did he do?

(Testimony of Cyrus Sterns.)

A. He came in——

Q. What did he do in this purchase of the whiskey, pay somebody else for it?

A. You don't give me a chance to answer. I am trying to answer.

The Court: We would like you to answer the question first, and—— [109]

The Witness: He did not give me personally any money. He gave it to one of the boys or one of the salesmen.

Q. (By Mr. Burrell): One of your salesmen?

A. Yes. Now, I couldn't even remember which one it was, but I know he came in sometime later and he was raising the devil, and we were late in delivering the merchandise to him. In the meantime he sold his place and we delivered six cases to him because he wanted that much to carry him over until he made the transfer to the person that bought it, and refunded the balance of his money. That is all our records show, six cases.

The Court: You say that is all your records show?

The Witness: That is all my delivery records show.

The Court: Where are those records, please?

The Witness: You have them there.

The Court: I think, Mr. Reed——

The Witness: You got them there. I took them out of that this morning.

The Court: I think, Mr. Reed, that where your witness, where your client feels that he must refresh

(Testimony of Cyrus Sterns.)

his recollection from some memoranda, and then indicates that his memoranda is made from some records, then we ought to have the records.

Mr. Reed: Mr. Sterns, are you referring to your [110] black book here?

Mr. Burrell: Are you referring to invoices?

The Court: He is pointing to the counsel table.

The Witness: Mr. Radke, in that '43 you will find in that thing that you just made up, you will find J. Smith, six cases, \$177.00.

Mr. Burrell: Do we have the invoices here in court from South Pacific to these persons to whom you dealt?

The Court: You can step down, Mr. Sterns, to locate that.

We will take a short recess.

(Short recess taken.)

Mr. Burrell: Your Honor, I should like the record to show that in response to a subpoena served upon Mr. Syracuse, proprietor of the South Pacific Wholesale Company, he has produced in court the original invoices of the liquors which they delivered and billed out during the years involved; that the immediate purpose of this cross examination, counsel for the Petitioner and myself have taken out of those books and selected those invoices which pertain, in the first instance, to Robert E. McClain, John Randolph and Luther J. Smith, and at this time I should like to introduce them. And I believe it would be manageable if they were in one group clipped together, and I will introduce them

(Testimony of Cyrus Sterns.)

as Respondent's Exhibit next in order. I can't recall what that is. [111]

The Clerk: H.

Mr. Burrell: Respondent's Exhibit H.

Mr. Reed: No objection.

The Court: Received as Exhibit H.

(The document above referred to was received in evidence and marked Respondent's Exhibit H.)

Q. (By Mr. Burrell): At this time I will hand to the witness the various original invoices in Respondent's Exhibit H, and will call your attention first to those here pertaining to R. E. McClain. This is the same McClain, Mr. Sterns, to whom I referred earlier, and with respect to whom I believe there was a little confusion.

Now, you are looking at invoices of South Pacific Wholesale Company. Can you identify those sales and deliveries of whiskey as being whiskeys handled through you, and which you arranged for?

A. If, as I say, he will tell me that he met me through Mr. Henderson, then it is my sale.

Q. Can you tell just by looking at those documents whether or not you arranged for the sale of that whiskey, or those sales?

A. I couldn't answer that.

Q. You have no idea? [112]

A. You take 14,000 cases of whiskey and you want me to identify these, whether those are——

The Court: Let me ask this question: Mr. McClain lived in San Bernardino?

(Testimony of Cyrus Sterns.)

The Witness: That is right.

The Court: You did get orders from him?

The Witness: That is right. I saw the man once or twice, if that is the same man.

The Court: And orders that you would get would have to be filled by South Pacific because you had no license to sell whiskey. Now, isn't that right?

The Witness: That is right.

The Court: So if that invoice shows sales to Mr. McClain through South Pacific—the invoices speak for themselves—South Pacific did make deliveries to McClain.

The Witness: That is true.

The Court: Now, Mr. Burrell, South Pacific presumably kept a record of what they were handling for Mr. Sterns. Is that right, Mr. Reed?

Mr. Reed: Yes, your Honor. All of those particular brands were handled exclusively for Mr. Sterns, as I understand it.

The Court: Mr. Sterns' name doesn't appear on any of the invoices.

Mr. Reed: No. [113]

The Court: But there isn't any question, is there, that these invoices represent the account of Mr. Sterns?

Mr. Reed: That is correct.

Mr. Burrell: Do you so stipulate?

Mr. Reed: Yes.

Mr. Burrell: As to all the documents, John Randolph. Luther J. Smith and McClain, Mr. Reed?

Mr. Reed: May I ask Mr. Sterns?

(Testimony of Cyrus Sterns.)

Mr. Sterns, you heard what I am asked to stipulate. Am I correct? Are they your brands?

The Witness: They are, but I sold this man 35 or 40 cases of national brands which——

The Court: We are not——

Mr. Reed: That are not in there?

The Court: We are not going into that, Mr. Sterns. That may have been another and separate transaction. Again I say we have to take things one at a time and nail them down.

Mr. Reed: Mr. Sterns, do those invoices indicate that your brands were sold in those invoices?

The Witness: Yes.

Mr. Reed: Letter after them, and no others?

The Witness: No; the others would not be invoiced by South Pacific.

Mr. Reed: So stipulated.

The Witness: What I am trying to do, if I may explain, supposing a man gave me a check for \$1,482.00 and I delivered other merchandise for that extra money to him——

Mr. Burrell: We are not involved with any other merchandise. I am referring only to——

The Court: You haven't been asked that question.

The Witness: The attorney asked me how much overage or how much blackmarket.

The Court: Mr. Sterns, we only take up one question at a time. We are making a record. If he asked you that question 15 minutes ago or this morning, it is not the question he is now asking you.

(Testimony of Cyrus Sterns.)

I will go over the whole record and will consider all the questions and all the answers.

Has your question been answered with respect to Exhibit H?

Mr. Burrell: It is my understanding that Mr. Reed stipulated that South Pacific did deliver to the names in those invoices, Respondent's Exhibit H, the merchandise therein shown, and that it was for the account of Mr. Sterns. Is that correct?

Mr. Reed: Mr. Burrell, I have no way of knowing they were delivered to that party. I stipulate those came out of South Pacific's records, and I think they speak for themselves. But as to my knowledge that deliveries were actually made to——

The Court: Anyone here from South Pacific Company? [115]

Mr. Reed: Yes, your Honor; the proprietor.

Mr. Burrell: We will leave it for the moment, if you wish.

The Court: We can call him to the stand and ask him to testify what these invoices are.

Mr. Burrell: Are you prepared to stipulate in a more limited way than the documents in Respondent's Exhibit H, which are invoices to South Pacific to therein named purchasers or of whiskey relating to Mr. Sterns' account?

Mr. Reed: Yes, so stipulated.

Q. (By Mr. Burrell): Now, I will ask you once again: Do these invoices in Respondent's Exhibit H in any way refresh your memory of R. E. Me-

(Testimony of Cyrus Sterns.)

Clain? Do you recall him now, or your dealings with him? A. I don't remember.

Q. Do they refresh your memory so you now recall your dealings with Luther J. Smith?

A. Only what I said a little while ago, that the argument that I had there simply remains in the back of my mind.

The Court: That isn't the question. You see, you are going over to something else. This invoice shows some sales are made to somebody else. Now, the invoices, I think, will have to speak for themselves. [116]

The Witness: If that is what the invoices are, then it has evidently been delivered. I was referring possibly——

The Court: You weren't asked about anything else, and your answer becomes argument if you begin to go into other things. You will be asked other questions. You have been asked some questions.

Q. (By Mr. Burrell): One of the invoices in Respondent's Exhibit H shows that South Pacific Wholesale Company sold to Luther J. Smith, doing business as Hollywood Cafe, 6916 Santa Monica Boulevard, Los Angeles, May 2, 1944, 30 cases, Rocky Springs blended whiskey. Do you recall whether or not that was handled in your account, whether you arranged for that sale?

A. I think so.

Q. You think that you did? A. Yes.

Q. Did you, in respect to that sale and no other, receive from Mr. Smith any moneys yourself?

(Testimony of Cyrus Sterns.)

A. No, I didn't in this particular case.

Q. You received no moneys yourself?

A. Because when I came in sometime later then I was told that he had bought some merchandise.

Q. Does that invoice indicate that the invoice was paid directly by Mr. Smith to South Pacific Wholesale Company? [117]

A. I can't answer that. I don't know.

Q. It has a stamp of "Paid." A. Yes.

Q. That is the only indication. Is it your testimony that you personally received no funds, nor any of your agents or employees received any funds from this shipment in respect to Mr. Smith?

A. I did not receive any funds.

Q. The only thing involved in that sale of whiskey is that South Pacific sold it to Mr. Smith and you received the accounting on the 15 per cent mark-up. Would that be it? Is that your testimony?

A. It may be that he gave one of the boys a check to me and I don't recall it.

Q. Would one of the boys have given you the check?

A. He must have, but Mr. Smith did not. I do not remember having——

Q. Why do you say he must have?

A. If he got the merchandise he must have paid for it.

Q. Wouldn't it be sufficient, legally, to pay South Pacific? A. He may have.

(Testimony of Cyrus Sterns.)

Q. And you to have received nothing other than your accounting later from South Pacific?

A. That is correct. As long as he was brought in [118] there by—possibly he did not pay me; may have been paid with a check made out to me.

Q. Well, it is your testimony that you don't know? A. I don't know.

Q. You might have received some money directly from Mr. Smith?

A. I can't say that I did. I don't remember.

Q. And if Mr. Smith paid the full invoice amount to the South Pacific Company would you have received anything in addition to that yourself? A. No.

Q. If Mr. Smith had paid any moneys to one of your employees or agents, would they have accounted to you for that?

A. Giving me the OPA price. That is all I was interested in.

Q. I see. I don't believe that earlier we have discussed Mr. John Randolph, had we?

A. I think it is in the same group.

Q. In the invoices, but we hadn't discussed him.

The Court: You asked questions relating to Robert E. McClain and Luther J. Smith.

Mr. Burrell: Yes, your Honor.

Q. (By Mr. Burrell): Mr. Sterns, did you sometime in August or September [119] of 1943 approach Mr. John H. Randolph doing business as Herb Randolph, 6160 Hollywood Boulevard, and offer to sell him whiskey?

(Testimony of Cyrus Sterns.)

A. I didn't approach anybody. They came in to me. I didn't go out——

Q. Did Mr. Randolph approach you for the purchase of whiskey?

A. I can't remember. I had four hundred and some customers. I can't remember every one of them over a period of ten years.

Q. Did you advise Mr. Randolph—do you know of whom I am talking now, John H. Randolph?

A. The name seems to ring. I don't know if I would know him.

Q. Apparently you wouldn't, because he has been sitting in the courtroom all day, except for the last 15 minutes.

A. Then I didn't recognize him.

Q. Referring to the original invoices in Respondent's Exhibit H which are directed to John H. Randolph, which we have stipulated they are for whiskey in your account, do any of these refresh your memory as to your arrangements with Mr. Randolph? A. No.

Q. Do you have any recollection of receiving money from Mr. Randolph? [120]

A. No, I don't.

Mr. Burrell. I see. I believe that is all at this time, your Honor.

Mr. Reed: One or two more questions, Mr. Sterns.

Redirect Examination

Q. (By Mr. Reed): Mr. Sterns, I believe you testified you paid your salesmen a dollar a case for

(Testimony of Cyrus Sterns.)

their sales. What did that amount to over a year? Do you want to look in your return and see how much you claimed?

A. I did most of the selling, I think. I don't know where I could find it.

Q. Maybe I can help you there.

The Court: That's a self-serving matter; doesn't prove anything, actually, to have the witness refresh his collection by looking at the return. At least it is not the best evidence.

Now, did Mr. Sterns keep a record of what he paid salesmen as commissions during the taxable years?

Mr. Reed: Yes, your Honor. We have a record. We will introduce it.

The Court: Where is the record of what he paid salesmen?

Mr. Reed: Mr. Radke's examination disclosed that for the year 1943 Mr. Sterns paid commissions of \$4,650.00 [121] on total sales of \$201,098.98, including his own sales.

The Court: Does the Respondent accept those figures?

Mr. Burrell: I can't at this moment. I don't even know what they are being read from.

The Court: Being read from Exhibit 11 or 12.

Mr. Burrell: Your Honor, may I—I recall that Exhibit 11 or 12 went in without any objection on my part, at which time we were referring to a certain schedule in there; as to all other matters I would certainly want to reserve my right to cross

(Testimony of Cyrus Sterns.)

examine. I am not stipulating to the truth of everything in here, certainly.

The Court: Then I can't receive them in evidence, because there is a lot of material in there, and the Petitioner will rely on those schedules as proof of various matters.

Mr. Reed: I planned to put Mr. Radke on the stand. He went over to South Pacific and worked with Mr. Cummins on Mr. Syracuse's difficulties with the Department.

The Court: It is a very simple matter. The question is, where are the original records of items of this kind? There is a black notebook in evidence. Does that contain a record of commissions paid?

The Witness: No.

Mr. Reed: Probably I can get to this another way, your Honor. [122]

The Court: Where is 11 and 12 that belongs to the Court? Somebody has taken my copy.

You have just given a figure. \$4,650.00 that has been paid to salesmen in one of the taxable years.

Mr. Reed: 1943.

The Court: Where does that appear? Is that an analysis of expenses?

Mr. Reed: Yes, under deductions on page 1.

The Court: I'll have to say that this is all stricken from the record, Mr. Reed, in which at the present you say, "I think I can explain that it is shown in Exhibit 11 that the commissions amounted to \$4,650.00," because I don't know yet how that

(Testimony of Cyrus Sterns.)

figure was arrived at. Respondent doesn't agree, doesn't stipulate that that was an expense.

Mr. Reed: I withdraw that, your Honor. What I am trying to prove is this: I believe it's been entered into evidence that one dollar was the commission, salesman's expense that Mr. Sterns bore, that his gross income is 15 per cent, that the dollar had to be paid out of amount to so little the inference was that he must have had other revenue in order to pay the salesman a dollar.

I am trying to show that the total sales of 14,000 cases of whiskey, of total sales, 1943, amounted to approximately \$200,000.00, and very small sum paid to salesmen. [123]

The Court: Well, one way of getting at that is what percentage of liquor sold for his account was sold by salesmen.

Q. (By Mr. Reed): Mr. Sterns, please answer that. What percentage of the liquor sold for your account was sold by salesmen where you had to pay \$1.00 commission to the salesman?

A. Well, I would have to see.

Q. Approximately. Was it large?

The Court: What would you have to see?

The Witness: I would say 4,000 cases or——

The Court: You say you would have to see something.

The Witness: Get the figures to say whether it was Charlie Mehan, how much he sold; or Mike O'Hara.

The Court: Where are those figures?

(Testimony of Cyrus Sterns.)

The Witness: I have these here.

The Court: That is what I have been inquiring about. Where is the record?

The Witness: Paid your commission, your salesmen.

The Court: You can step down and get it. In which book on those tables, Mr. Sterns, is it?

The Witness: I don't know.

The Court: Is it in some notes?

Mr. Reed: Probably to expedite the matter, please, I withdraw—— [124]

The Court: Just a minute. I don't want to have the record up in the air at certain points. I want to try to get some continuity. Mr. Sterns,——

Mr. Reed: I withdraw the question, your Honor. I will get to that in another manner through Mr. Radke.

The Court: Well, this is very trying for everybody, Mr. Sterns. You see, if you had kept records carefully we wouldn't have to dig into all this.

Mr. Reed: That is all, Mr. Sterns.

The Court: That is all. What does that mean, Mr. Reed, that you can't—step down.

(Witness excused.)

The Court: Does that mean that you can't locate the item?

Mr. Reed: There is a very small amount of such expense claimed as expense, and when Mr. Radke is on the stand——

The Court: That isn't the point. That is a fraud case, isn't it? What was the claim? There was a

question back about what he actually paid agents. Now, do you have evidence on it or not? It isn't a matter of what he claimed on the return, because you know perfectly well, Mr. Reed, that a return is in itself a self-serving document. The whole return has to be questioned.

Now, apart from the return, what evidence do you [125] have of what he paid salesmen?

Mr. Reed: Mr. Sterns, will you take the stand again, please?

The Court: All right.

Whereupon,

CYRUS STERNS

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Mr. Reed: Please mark that as Petitioners' Exhibit for identification.

The Clerk: Exhibit 15 for identification.

(The document above referred to was marked Petitioners' Exhibit No. 15 for identification.)

Q. (By Mr. Reed): Mr. Sterns, I hand you Petitioners' Exhibit for identification No. 15 and ask you what they are, please.

A. Well, commission checks to Joe Hernandez, Harry Lewis. I gave some money to Mr. Sutterman's wife while he was away, and \$200.00 again to Mr. Sutterman.

(Testimony of Cyrus Sterns.)

The Court: You will have to speak louder for the reporter, Mr. Sterns.

Q. (By Mr. Reed): What is the total, Mr. Sterns? [126] A. \$1,050.00.

The Court: \$1,050.00.

Mr. Reed: I offer in evidence Petitioners' Exhibit No. 15.

The Court: Let me see it, please. That is Exhibit 15 for identification. Well, you haven't laid an adequate foundation for that. I wouldn't know what weight to give it now. You just want to offer some checks that have some names and amounts.

Q. (By Mr. Reed): Mr. Sterns, what do these checks represent? This check to Joe Hernandez, what does that represent? A. A commission.

The Court: Who was Joe Hernandez?

The Witness: One of the salesmen.

The Court: I never heard of him before.

Q. (By Mr. Reed): Here is a check to Harry Lewis on December 16, 1943, in the amount of \$500.00. What does that represent?

A. Commissions.

The Court: Who is Harry Lewis?

The Witness: One of the men that was in that San Francisco sale on which I was indicted.

The Court: A man named Harry Lewis?

Mr. Reed: Yes, your Honor. [127]

Q. (By Mr. Reed): The next check, Elsie Sutterman. \$100.00, September 30, 1943.

A. Right. That was when I had Mr. Sutterman go East for me, and I told him that I would take

(Testimony of Cyrus Sterns.)

care of his family while he was gone. I think I paid her about \$200.00 or \$250.00 while he was gone on that mission for me.

Q. The next one is \$50.00, L. C. Sutterman, September 20th. And the last name, October 13, 1943, Elsie Sutterman, \$200.00. Is it your testimony——

The Court: Let him testify and not ask leading questions.

Q. (By Mr. Reed): Just what do these checks represent?

A. Well, I was giving him, or did give him a thousand dollars, plus whatever money I advanced to his wife while he was gone.

The Court: Sutterman?

The Witness: Yes, Mr. Sutterman, your Honor.

The Court: What were you giving him a thousand dollars for?

The Witness: Well, he went back East on a matter to buy a brewery.

The Court: Then the checks to Mr. Sutterman have nothing to do with commissions on sales of liquor handled by South Pacific? [128]

The Witness: He never handled any.

The Court: Take those out.

Mr. Reed: Yes, ma'am.

The Court: Checks to Sutterman come to how much?

Mr. Reed: \$350.00.

The Court: All right. Eliminating those from the other checks would read a total of \$700.00.

(Testimony of Cyrus Sterns.)

Q. (By Mr. Reed): Mr. Sterns, in addition to these check payments, did you make payments by cash to salesman? A. Sometimes I did.

Q. Can you approximate the amounts for 1943 and 1944?

A. I wouldn't—I can't approximate them.

Mr. Reed: That is all.

Mr. Burrell: May I have a question or two in this regard, your Honor?

The Court: Yes.

Cross Examination

Q. (By Mr. Burrell): May I see those checks, please? We have one check, earlier referred to, \$200.00 paid by you to Joe Hernandez. Will you state again who Joe Hernandez is?

A. He used to sell liquor for me.

Q. Salesman of yours on November 1, 1943?

A. Yes, he was. I would say he was.

Q. \$200.00 in payment of commissions for liquor sales that he had effected for you?

A. That may be his expense——

Q. What do you mean, it may be his——

Mr. Reed: Let him finish it.

The Witness: ——may be his expense to go to Seattle on a whiskey deal. That may have been part of the expense, but I can't identify whether it is for commissions. He had gotten commissions and made sales from time to time for me.

The Court: Well, he can't identify that as commissions so that check goes out for this purpose.

(Testimony of Cyrus Sterns.)

What about the others?

Eliminate \$200.00. That leaves \$500.00 in checks.

Mr. Burrell: I have no cross examination in regard to the others, your Honor.

Mr. Reed: The remaining check is to Harry Lewis. The others have all been eliminated. This check is for \$500.00.

The Court: Who is Harry Lewis?

Mr. Reed: Who is Mr. Lewis?

The Witness: Salesman.

The Court: Salesman?

The Witness: Yes. [130]

The Court: What is the date of that check?

Mr. Reed: December 16, 1943.

The Court: What is the amount?

Mr. Reed: \$500.00.

The Court: What is that payment to Harry Lewis for, Mr. Sterns?

The Witness: Well, he sold liquor for me.

The Court: Well, if you paid him \$500.00 in commission, what would that signify?

The Witness: 500 cases.

The Court: Would you know what kind of whiskey?

The Witness: Well, it would be possibly Rocky Springs or U.D.L.

The Court: What is U.D.L.?

The Witness: United Distillers—Canadian whiskey.

The Court: Then that narrows down the proof to the extent of \$500.00 of commissions paid and I

(Testimony of Cyrus Sterns.)

can receive 15 for identification consisting of that one check, if the others are eliminated. The others are all eliminated?

Mr. Reed: Yes, they are.

The Court: Then that sharpens up your evidence on that specific point. At any rate, we have eliminated the doubtful part of that. When I say we have eliminated it, I mean that the Court must do it during the trial because these records are long and sometimes the cases can't be taken up in Washington for several months for the purpose of preparing the written report in the case. So the Court has to assist itself.

Now, I hope you understand that, Mr. Reed.

Mr. Reed: Yes, I do, your Honor.

The Court: It is a little troublesome to counsel, I know, but the Court has to decide the case and the clearer everything is in the Court's mind, the presumably the decision is right in the end. I am trying to get the facts and the whole proof of the matter. If I allow you or if I just let you go along while I know that there are some doubtful items, then you may think you are doing fairly well with your case, and in the end it turns out that you are not. So you would rather know as you go along, wouldn't you?

Mr. Reed: Yes, indeed.

The Court: All right.

Mr. Reed: Your Honor, I offer this check, payable to Harry Lewis in the amount of \$500.00, dated September 16, 1943, numbered Petitioners' Exhibit No. 15 for identification into evidence.

(Testimony of Cyrus Sterns.)

The Court: 15 is received in evidence.

(The document heretofore marked Petitioners' Exhibit No. 15 was received in evidence.)

Mr. Reed: That is all, Mr. Sterns.

Mr. Burrell: That is all. [132]

The Court: You may be excused.

(Witness excused.)

Mr. Reed: Mr. Sutterman.

The Clerk: Please raise your right hand and be sworn.

Whereupon,

LEONARD SUTTERMAN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: Leonard Sutterman.

The Clerk: Please spell it.

The Witness: S-u-t-t-e-r-m-a-n.

The Clerk: Your address?

The Witness: 167 South Canon Drive, Beverly Hills.

Direct Examination

Q. (By Mr. Reed): Mr. Sutterman, do you know the Petitioner Cy Sterns? A. Yes, sir.

Q. Did you have business transactions with him in 1943? A. I did.

(Testimony of Leonard Sutterman.)

Q. Please state what they were.

A. Well, he commissioned me to go—I had a lead that [133] there was a certain brewery in Flint, Michigan, that was interested in selling a percentage of the brewery, and I told him about it, and he seemed to be interested and wanted me to go down and try to make a deal.

The Court: What kind of a deal?

The Witness: What kind of a deal?

The Court: Yes.

The Witness: Well, the information I had was that the brewery was willing to sell a percentage of their stock, about 25 or 50 per cent of the stock, and with that understanding, if you purchase that amount you would get that many cases, cases of beer shipped to you, and there was an extreme shortage of eastern beer here at that time, and it seemed to be a very attractive deal.

Q. (By Mr. Reed): Did Mr. Sterns provide you with money for this trip?

A. Well, he paid my transportation and paid me a thousand dollars, with the understanding that if the deal was consumated, that I would become a sales manager for the sale of the beer in this territory.

Q. Mr. Sutterman, did Mr. Sterns provide you with a large amount of money to assist in promoting this deal?

A. Well, he wired me the money—originally the head of the brewery wanted I think \$50,000.00, which would give them 25 per cent interest in the brewery, and also supply [134] you with 50,000

(Testimony of Leonard Sutterman.)

cases of beer. Mr. Sterns didn't have the money at the time, and he wired different amounts, amounted to around \$30,000.00—I don't remember, \$30,000.00 or \$40,000.00.

Q. Did the deal go through?

A. No, it didn't.

Q. You brought the money back to Mr. Sterns then?

A. Yes, sir.

Q. How did you bring that back, cash, wire, money order,—

A. Cashier's check, some of the cash returned in cashier's check.

Q. Why did you have some converted to cashier's checks?

A. Well, the money was wired cash through Western Union; instead of carrying it around in cash, I left it in the vault in the hotel, and when I was ready to leave—Mr. Sterns told me how much he wanted in checks and how much in cash.

Q. Did you try to buy some beer for Sterns other than this transaction where he tried to buy an interest in the brewery?

A. Yes. I gave some attorney in Chicago \$5,000.00 to buy some beer, and he wasn't able to consummate the deal, and he returned \$4,750.00 and kept \$250.00 for his legal fee.

Q. Do you know Oscar Ross?

A. Well, I know him through meeting him through Mr. [136] Sterns, at his office.

Q. When did you know him?

(Testimony of Leonard Sutterman.)

A. When I went to Mr. Sterns' office in '43 or '44. I met him there at the office.

Q. Was he there on business? Was he visiting? Or what took place?

A. He seemed friendly, a friendly visit, playing gin rummy, or sitting around the office there.

Q. Who all was there at some specific time when Mr. Ross was there?

A. Oh, I don't remember offhand. I know Mr. Ross, Mr. Sterns and myself were probably sitting in the office; maybe a bookkeeper. I don't remember.

Q. Can you relate any incident to indicate that Mr. Ross thought well of Mr. Sterns?

A. Oh, aside from the fact that they seemed to be very friendly, and on one particular instance, maybe after a gin rummy game, why, Ross was telling me how well he thought of him, said that he liked him like he liked a brother.

Q. Was there ever any discussion of him lending Sterns money?

A. Well, he didn't say so, but I think in one instance when he mentioned the fact how much he cared for him, Mr. Sterns said "He already loaned me some money."

Q. Did he say that in Mr. Ross' presence? [136]

A. While he was there, yes.

Mr. Burrell: I don't mind a reasonable amount of hearsay going in, but I object to any more of that.

(Testimony of Leonard Sutterman.)

The Court: This is hearsay, Mr. Reed. The objection is sustained.

Mr. Reed: Withdraw that.

That is all, Mr. Sutterman.

Mr. Burrell: No cross examination of this witness, your Honor.

The Court: You may step down.

Do you want this witness excused?

Mr. Reed: Yes.

The Court: You are excused, Mr. Sutterman.

The Witness: Thank you, your Honor.

(Witness excused.)

Mr. Reed: Mr. Ross, please.

The Clerk: Please raise your right hand and be sworn.

Whereupon,

OSCAR S. ROSS

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

The Witness: Oscar S. Ross, 5813 Spring Oak Drive, [137] Los Angeles 27.

Direct Examination

Q. (By Mr. Reed): Mr. Ross, do you know the Petitioner Cy Sterns? A. Yes, I do.

Q. Did you know him in 1943 and 1944?

A. Yes.

Q. 1946? A. Yes.

Q. Did you have any business with him?

(Testimony of Oscar S. Ross.)

A. In a very small way. He was a good friend of mine, and I probably made one or two or three small purchases from him. Outside of that, I would sometimes lend him money.

The Court: Just answer the question you are asked.

What was the question that was asked?

Mr. Reed: Please relate the business that he conducted with Mr. Sterns.

The Court: What is your business, Mr. Ross?

The Witness: I am at the present time in the machine business.

The Court: Did you have a business in 1943?

The Witness: I had some cocktail bars at that time.

The Court: Where?

The Witness: Oh, I had one on Jefferson and Vermont; one on 98th and Vermont; one on West Adams and [138] Normandie. I had one on East First Street. I had several.

The Court: Did you have those during 1944?

The Witness: I think I sold out in '44, all my places.

The Court: I will ask you to reframe your questions. You asked the witness if he had any business with Mr. Sterns. Apparently he doesn't understand what you mean. Will you make it clear what you mean.

Q. (By Mr. Reed): Did you buy whiskey from Mr. Sterns in 1943 or 1944?

(Testimony of Oscar S. Ross.)

A. I probably bought two or three small purchases through him.

Q. The price that was asked you, what was that?

A. Ceiling prices.

Q. Did you ever loan Mr. Sterns money during 1943 or 1944?

A. Yes, I did.

Q. In sizeable amounts?

A. Yes.

Q. Did he repay you?

A. As far as I recollect, he did.

Q. Did you lend him some money in 1946?

A. I can't remember dates. It was a long time ago, and I don't keep track of these things unless I have to. [139]

The Court: What evidence is there, Mr. Reed, of any loans of money by Mr. Ross to Mr. Sterns?

Mr. Reed: We have some canceled checks, your Honor, that are marked "Loan" that are payable to Mr. Ross.

The Court: You haven't produced them, though, in your examination of Mr. Sterns.

Mr. Reed: Your Honor, I had anticipated getting the benefit of that evidence through Mr. Radke, who will qualify as an expert accountant and who has made an examination of all the transactions available of Mr. Sterns and South Pacific and Mr. Ross and various other people he did business with. The checks we have are very voluminous and I felt that I believe that would be proper evidence.

The Court: What the Court had in mind is this: You didn't ask this witness, Mr. Ross, if he had any evidence of his loans to Mr. Sterns.

(Testimony of Oscar S. Ross.)

Mr. Reed: Thank you, your Honor.

Q. (By Mr. Reed): Mr. Ross, do you have any evidence of your loans to Mr. Sterns?

A. No.

Q. Where are your books?

A. I haven't got books from ten years ago.

Q. Why?

A. Wasn't necessary to keep them. I could accumulate [140] nothing but books.

Q. In 1943 and 1944, those were poor years, particularly in the liquor business. Were your books examined by the Revenue Department?

A. Yes. They were examined, I think, in '46 and '47.

Q. Did Mr. Cummins examine them?

A. I don't remember. I had a furniture factory at that time, and I was—I remember somebody spending four days there checking all my transactions. I had several licenses during those years, and my tax examination was all cleared for that period.

The Court: That is all irrelevant. We don't have Mr. Ross' tax liabilities before us in this case.

Mr. Reed: You are right.

The Court: The answer is that you don't have any records of loans made to Mr. Sterns in 1943 and 1944, or prior thereto.

The Witness: No.

The Court: Or afterwards.

The Witness: I think he is referring to one loan in '46 that I made out of my furniture factory, as a personal loan. He was in——

(Testimony of Oscar S. Ross.)

The Court: What loan did you make to Mr. Sterns?

The Witness: In '43 and '44?

The Court: Let me put it this way: How many loans [141] for all times did you ever make to Mr. Sterns?

The Witness: I can't remember.

Mr. Reed: If your Honor please——

The Court: Did you make a good many loans to him? Just a minute, Mr. Reed.

The Witness: I must have made five or six, or even up to ten various loans, that were returned.

The Court: When did you make those loans?

The Witness: During '43 and '44. I am only recollecting that I did that. But the time that I did and the amounts I made them in, I don't remember.

The Court: Think of something that would fix this in your mind. A person comes to you to borrow money, there is something that fixes it in your mind.

The Witness: I would say that during the time I must have known him in the neighborhood——

The Court: I didn't ask you that. I asked you to try to fix something in your mind about the loans.

The Witness: I don't understand the question, your Honor.

The Court: I want you to try to recall the specific loans. It would probably help you to recall them if you could remember why you ever made any loans to Mr. Sterns. Did Mr. Sterns ever come

(Testimony of Oscar S. Ross.)

to you and say that his mother needed to go to the hospital and needed a certain [142] amount of money to send brother to Alaska—that is the way you recollect why you do things.

What would you be able to recall as the reason you would have loaned Mr. Sterns any money; and that will help you recall when you did it and what you did.

The Witness: Mr. Sterns was a friend of mine, and he has gone into the liquor business and he comes to me and says he has an opportunity of buying certain amounts of liquor, would I lend him any money, and I did. After the first loan he repaid it, and I would lend him money at a different time.

The Court: That ought to help you refresh your recollection about how much you would loan him at one time.

The Witness: Well, there is——

The Court: Now, we are examining you, Mr. Ross. Petitioner called you as a witness, and I want to find out how much your testimony is worth. It is a very——

The Witness: Is it over-all, how much over-all or specific amounts or specific dates?

The Court: We want to know about specific loans.

The Witness: I don't remember those; outside of one.

The Court: Don't you recall whether on the occasion of any time when you made a loan to him it was ten cents?

(Testimony of Oscar S. Ross.)

The Witness: I only remember one loan, because it [143] was called to my attention, \$5,000.00.

The Court: How was it called to your attention?

The Witness: Mr. Reed showed me a photostatic copy of some money that I wired through Western Union to Mr. Sterns' account.

The Court: What is it, a photostatic copy of a telegram?

The Witness: Evidently a receipt from Western Union.

The Court: Aside from that, you can't remember specifically any loans to Mr. Sterns?

The Witness: No, I don't.

The Court: And you can only remember this other one because you have been shown a telegram?

The Witness: That is correct.

The Court: And does that telegram have your name on it?

The Witness: Yes, has my signature.

The Court: All right. I suggest that if you have been following this, Mr. Reed, I suggest that you produce the telegram to which this witness has referred. He says it has his signature on it.

Mr. Reed: I believe that is already in evidence, in conjunction with the Havana, Cuba matter this morning.

The Court: I have an exhibit——

The Clerk: That is Exhibit 7. [144]

The Court: Will you get the Court's copy, please?

The Clerk: Here it is. I have it.

(Testimony of Oscar S. Ross.)

The Court: We have in evidence Exhibit 7 and you have referred to it, Mr. Ross. What is there in Exhibit 7 which refreshes your recollection?

The Witness: I don't remember the—I don't remember anything about that outside the fact that I see my signature on here. It was received from me, money that was evidently wired to Mr. Sterns.

The Court: You mean you wouldn't testify under oath that you sent Mr. Sterns \$5,000.00?

The Witness: Yes, I said I did. This shows it.

The Court: Well, your testimony isn't to that effect. You say you don't remember anything about it, except you see your signature.

The Witness: I mean, I can't remember from memory the exact amount and the dates.

The Court: Is that your handwriting on the bottom part of this photostat?

The Witness: No.

The Court: Now, did you or did you not send, "Pay over \$5,000.00 to Western Union to be sent to Mr. Sterns at the St. Francis Hotel, San Francisco," on March 21, 1944; if you will read that? That is what it says?

The Witness: Yes, I sent money to Mr. Sterns [145] through Western Union.

The Court: How much did you send?

The Witness: \$5,000.00.

The Court: All right.

Mr. Reed: If your Honor please, Mr. Burrell has just informed me that they are willing to stipulate that loans were made by Mr. Ross. I believe

(Testimony of Oscar S. Ross.)

their information comes from an investigation of Mr. Ross' books.

The Court: I don't know what to do about this. We have a witness on the stand, and when we get finished with this witness we will go on to something else. Again, we will take up one thing at a time.

Have you any further questions to ask this witness?

Mr. Reed: May I offer——

The Court: I have asked you, Mr. Reed,——

Mr. Reed: I want to ask him if——

The Court: You are not—we tell witnesses to be responsive to questions. You are not responsive to the Court's question. The checks you have in your hand were not made out by this witness. Now, this isn't the proper time to offer them.

Mr. Reed, have you any other questions to ask this witness?

Q. (By Mr. Reed): Do you know whether or not Mr. Sterns failed in the [146] liquor business in 1944? A. No, I don't.

Mr. Reed: That is all.

The Court: Any questions, Mr. Burrell?

Mr. Burrell: Just for clarification.

Cross Examination

Q. (By Mr. Burrell): Mr. Ross, I understood you to testify a few minutes ago that during the years 1943 and 1944 you had made five, six, up to

(Testimony of Oscar S. Ross.)

ten loans to Mr. Sterns which were returned. Is that correct? A. Yes.

Q. When you say "which were returned," you mean he repaid them?

A. I am assuming they are repaid because I don't recollect him owing me anything.

Q. You also assume they are repaid or were repaid sometime in the years 1943 and 1944?

A. Yes.

Mr. Burrell: That is all, your Honor.

The Court: Thank you, Mr. Ross. I am sorry you had to wait so long.

Do you want to have this witness excused?

Mr. Reed: I would like to have him wait just one moment, your Honor. [147]

The Court: All right. You can sit down at the counsel table.

(Witness excused.)

Mr. Reed: Mr. Burrell offered to stipulate that certain loans had been made from Mr. Ross to Mr. Sterns. I would appreciate it very much if those amounts—you would give me those amounts.

Mr. Burrell: Yes. I am willing to stipulate, although I confess I would like to know for what purpose in the record——

Mr. Reed: The reason is, I believe it is Respondent's theory of the case that Mr. Sterns received large sums of money, unaccounted for, and actually any loans that he received from friends would not be income, and such evidence would be very helpful to the Petitioner. Mr. Ross has lost his books. That

is, he doesn't have them in his possession. We served him with a subpoena. We have these canceled checks from Mr. Sterns to Mr. Ross, apparently purporting to be——

Mr. Burrell: I will make this statement: Our agent is going to stipulate, and I am going to stipulate that we have not placed in our reconstruction of income of this Petitioner any of these loans that are involved in this testimony. However, if your Honor thinks it will be of help to the record, I will stipulate.

The Court: That probably would be helpful, yes, [148] Mr. Burrell.

Mr. Burrell: I offer to stipulate from our own records that on 9-21-43, Mr. Ross loaned to Mr. Sterns the sum of \$2,400.00, which sum was repaid on 5-10-44; that on 10-27-43 he loaned to Mr. Sterns the amount of \$5,500.00, which loan was repaid on 1-3-44; that on 11-23-43 he loaned the sum of \$8,000.00 to Mr. Sterns, which loan was repaid on 12-3-43; that on 4-6-44 he loaned to Mr. Sterns the sum of \$7,500.00, which was repaid as follows: On 4-14-44 the sum of \$3,500.00, and on 4-21-44 the sum of \$4,000.00.

We do not have in our possession the records involving this other, I believe \$5,000.00 which was mentioned.

Mr. Reed: Yes.

Mr. Burrell: I offer that stipulation.

Mr. Reed: Yes.

The Court: Will you accept the statement?

Mr. Reed: Yes, we accept that.

The Court: What are these checks that you have been interested in?

Mr. Reed: These checks, your Honor, are endorsed by Oscar Ross, apparently signed by Cy Sterns.

The Court: Do the amounts correspond with any of these?

Mr. Reed: Some of them do. I have one here, December 3, 1943, payable to Oscar Ross, signed by Cy Sterns, [149] payment of \$8,000.00.

Mr. Burrell: That is one that I read, your Honor.

Mr. Reed: December 31, 1943, \$5,500.00; September 25, 1944, \$950.00; April 24, 1944, \$2,000.00; April 11, 1944, \$3,500.00. That is all.

The Court: You are not going to offer the checks, is that right?

Mr. Reed: Yes. Thank you, your Honor.

The Court: Well, I don't know. I am confused now about this. And you see what the situation is. The checks support some of the items to which a stipulation has been entered into. They don't support every item.

Then the question comes up, well, what other payments to Mr. Ross. It muddies up the water.

Mr. Burrell: As a matter of fact, as there is no tie-in here of these other checks, I feel that I would have to at least object to them, without some kind of foundation, tie-in, being made for them.

The Court: Let me see the checks, please.

These are offered, as I understand, to prove repayment of loans? And I can't accept them now as

proof of repayments of loans because we have nothing that constitutes a foundation for the checks. Perhaps we will have to let it stand on the stipulation.

Have you another witness you want to call? [150]

Mr. Reed: May I put Mr. Sterns on again, your Honor?

The Court: I would rather do that tomorrow, if there is a possibility you can get through with the testimony of another witness. You have another witness here.

Mr. Burrell: May I interject something? Mr. Syracuse, who has been subpoenaed by the Respondent, who is the proprietor of the South Pacific Wholesale Company, or was during the years involved, stepped up and says he believes it rather impossible for him to appear tomorrow, and I wonder if he could appear at this time.

The Court: Take it out of order?

Mr. Burrell: Yes.

Mr. Syracuse: I postponed an appointment today and thought it would be possible that I would get called on today, and I made it for tomorrow.

Mr. Burrell: I would estimate his testimony on direct examination would probably be 15 minutes. It is difficult for me to say accurately.

The Court: Now, do you want Mr. Ross to stay any longer?

Mr. Reed: No.

The Court: You are excused, Mr. Ross.

You have another witness?

Mr. Reed: Yes, I have. I believe he would be [151] willing——

The Court: Here at the counsel table?

Mr. Reed: Yes.

The Court: Could we have him here tomorrow?

Mr. Reed: Yes, your Honor.

The Court: Then I suggest that you wait until tomorrow also, to take up the matter of those checks, and the loans. If you wanted those checks marked for identification, have them marked at this time, and then go back to that tomorrow.

The Clerk: 16 for identification.

(The documents above referred to were marked Petitioners' Exhibit No. 16 for identification.)

The Court: They will all be marked as one exhibit, 16 for identification.

We will take a short recess.

(Short recess taken.)

The Court: I believe that it would be better now if you ask Mr. Sterns to take the stand for a minute to explain these checks, and that will be at once place in the record, and we will be finished with that.

Mr. Burrell: Before Mr. Syracuse comes to the stand, I would like to make a brief statement. We have had a change of plans.

The Court: All right. All right, Mr. Sterns. That [152] was 16 for identification, checks to Mr. Ross, I believe.

Mr. Reed: Yes, your Honor.

Mr. Burrell: Well, your Honor, Petitioners' Exhibit No. 16 consists of five canceled checks all

drawn by Mr. Sterns payable, and all payable to Oscar Ross. Respondent is willing, from its own records, to stipulate that all of these checks are in repayment of loans to Mr. Ross, with the exception of Check No. 339, dated September 25, 1944, in the amount of \$950.00. And in regard to that check, we have no record to show its nature.

Whereupon,

CYRUS STERNS

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Reed): Mr. Sterns, I show you this check and ask you what it was for, and the date and who it was payable to. Just the top one, Mr. Sterns.

A. Well, he evidently had loaned me this. I would pay off the loan, borrow and pay off, and then if I needed it again I knew I could always go to him and get it. However, there are a lot of cash payments out of—my book will show that I had refunded to Mr. Ross—a lot of times he brought [153] cash in to me.

Q. This check then is in payment to the loan you received from Mr. Ross?

A. There isn't any question about it.

Q. This \$950.00 check? A. Yes.

Mr. Reed: I offer this as Petitioners' Exhibit 16 for identification in evidence, the check in the amount of \$950.00, dated September 25, 1944, payable to Oscar Ross and signed by Cy Sterns.

The Court: Mr. Syracuse, will you come forward?

The Clerk: Please raise your right hand and be sworn. [156]

Whereupon,

EDWARD ANTHONY SYRACUSE

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name, Mr. Witness, and your address, for the record.

The Witness: Edward Anthony Syracuse, S-y-r-a-c-u-s-e; 555 North Bronson, Los Angeles 4.

Direct Examination

Q. (By Mr. Reed): Mr. Syracuse, in 1943, what was your business?

A. I was engaged in the liquor business and wine business.

Q. Under your own name?

A. The South Pacific Wholesale Company, I owned *a loan*. The Garvey Winery, which I was president and general manager of, and 50 per cent stockholder, and I was also managing director of that Garvey Winery on Garvey Boulevard, Garvey, California.

Q. In 1943 I believe you entered a business arrangement with Cy Sterns. Will you describe that, please?

A. Mr. Sterns came to the office of South Pa-

(Testimony of Edward Anthony Syracuse.)

cific stating that he was waiting for a basic permit; that he had sources of procuring a certain amount of whiskey—didn't [157] specify the amount; that he also had made pledges to various customers and if I would take it in, and what I could do. We entered into an agreement, also financing it, that for financing, billing and delivering, best that I could do was \$2.00 a case. He agreed, and we proceeded from there on. The difference between the \$2.00 a case and the 15 per cent mark-up—

The Court: Just a minute, please. Were you asked anything about that yet?

The Witness: No ma'am.

The Court: Ask your next question.

Mr. Reed: What was the arrangement as to how Mr. Sterns and you divided the profits and expenses in conjunction with the sale of the liquor that he procured for you?

The Court: What do you mean by that question? What profit are you talking about, Mr. Reed?

Mr. Reed: The 15 per cent mark-up and the—

The Court: Let's stay away from leading questions. He testified that he was going to charge \$2.00 for handling.

Mr. Burrell: There is an agreement in evidence, one of the Petitioners' exhibits, between Mr. Sterns and South Pacific, setting forth the entire agreement.

The Court: What agreement?

Mr. Burrell: One of Petitioners' exhibits introduced this morning. [158]

(Testimony of Edward Anthony Syracuse.)

Mr. Reed: Here it is, your Honor.

Mr. Burrell: That would be the best evidence of their arrangement.

The Court: Exhibit 6 is the best evidence of the agreement between Mr. Sterns and South Pacific, and it is a rule of evidence that where you have a written agreement, that that is the best evidence. Now, do you know of any reason why you should go outside this written agreement?

Mr. Reed: No, your Honor.

Q. (By Mr. Reed): Was the agreement carried out? A. Yes.

Q. In 1943 were you familiar with the different qualities of whiskey? A. Yes.

Q. Are you acquainted with the quality and the popularity of the brands of whiskey that Cy Sterns was concerned with, Rocky Springs and U. D. L., and I believe one or two others that I believe you handled for him? A. Yes.

Q. Were they high quality whiskeys?

A. They were not nationally advertised brands, none of them were.

Q. Is it reasonable to believe that those particular brands of whiskey could have brought a premium price, or substantially [159] over ceiling price?

Mr. Burrell: I am not sure that the witness is qualified, in the present state of the record, to answer that question. I will object to it.

The Court: Objection sustained.

Q. (By Mr. Reed): When these invoices went

(Testimony of Edward Anthony Syracuse.)

out from your place of business, did you make any effort to protect yourself, or to assure yourself that the whiskey was not being sold at over ceiling prices?

A. The price was on the invoice. May I explain, your Honor, that due to the fact that the large amount of money was borrowed from the bank to pay for the bill of lading that came, before we could receive the whiskey, I made a rule that all whiskey that went out was C. O. D. unless if Mr. Sterns wanted an invoice to go prepaid, he would have to pay the amount of the invoice. And I believe that most of the invoices carry a stamp, very clearly, that if anyone asked other than the prices prevailing on the invoices, to notify the office, not to pay any more. It is a form that a lot of liquor people used.

The Court: All right.

Q. (By Mr. Reed): Would over ceiling sales by Cy Sterns be likely to involve you? [160]

A. They could have. Not necessarily. I mean, he had his own business.

Q. Did you ask any of Mr. Sterns' customers if they paid over ceiling?

A. I had a number of occasions to meet some of Mr. Sterns' customers and asked them pointblank if Mr. Sterns had asked over-the-ceiling price, and they said no, never.

Q. Can you recall any specific comment made by any one of those customers, the words he used?

(Testimony of Edward Anthony Syracuse.)

Mr. Burrell: I will object to it as hearsay, your Honor.

The Court: Objection sustained.

Q. (By Mr. Reed): Did you ever deliver direct to Sterns' customers yourself? A. No.

Q. Did any of his customers come to your store and take delivery and make payment there?

A. Yes. They either came to the warehouse, or they went to a public warehouse where a large percentage of the whiskey was stored there for collateral to the bank. We borrowed from the bank. It went in bond, and in order for us to release that whiskey, 100 cases or 200 cases, we had to get a release from the bank first so that the warehouse in turn would release that whiskey. [161]

Q. Did you ever personally collect the payment for this whiskey from the customers?

A. Not personally, no. The office—a lot of customers could have come there and picked up ten cases of whiskey and 25 cases of whiskey, and paid the office. I was not at South Pacific too much, probably about an average of six or seven hours a week, maybe two hours or three hours one day. I spent most of my time at the winery. I had a manager at South Pacific.

Q. Could you approximate the amount of business that was transacted in your office where payments were made direct to your office by Sterns' customers? A. No, I couldn't approximate it.

Q. Was it a substantial sum?

A. All invoices, every case that went out of the

(Testimony of Edward Anthony Syracuse.)

office, either the customers paid for it or Sterns paid for it; no open accounts. They were all C. O. D.

Q. Did Sterns have an office away from your office?

A. He did. He was on Santa Monica Boulevard when the arrangement was first made. Later on a vacancy happened next to my office on Beverly Boulevard and he rented that.

Q. Did he have expenses, to your personal knowledge, outside of what was accounted for through your books, such as salesmen commissions and rent?

A. Whatever expenses he had, they were his. I had [162] nothing to do with it. I didn't pay no salesmen, didn't pay anybody.

Q. Did you ever observe Sterns in possession of substantial amounts of cash? Did he carry a big roll?

A. Yes, he did.

Q. Did you ever observe him paying out sums of cash to anybody, or receiving large sums of cash, not in checks?

A. Several times. I mean, if a car of whiskey amounted to \$50,000.00 we'll just say as a matter of figuring, and a draft was there to be paid, rather than borrow the entire amount from the bank, Mr. Sterns could have paid probably \$20,000.00 and the balance was borrowed from the bank. So he had—it was customary in those days—it seemed that all these tavern owners and liquor stores, they had a lot of cash.

Q. Did you ever incur a loss because of liquor condemned by the authorities?

(Testimony of Edward Anthony Syracuse.)

A. Other than a freight loss? I got a couple of cars of whiskey that were quarantined, the Health Department said they were not fit for human consumption, and we didn't unload the whiskey; returned it to the shipper, and I was not able to collect the freight. I didn't pick up the draft.

Q. Do you know if Mr. Sterns had such a loss?

A. I believe he had one car of whiskey that went back. I am not sure.

Q. Did you ever offer Sterns a job to go to work for [163] you?

A. Yes. In 1944, latter part of '44, Mr. Sterns claimed that he was broke, financially, and ill, and I asked him if he wanted to go out and sell wine. He said he was not physically fit to do so.

Q. Did you, during the course of 1943 and 1944, in your relationship with Sterns, did you ever see him engaging in any high living or playing the ponies or otherwise disposing of money, other than in business?

A. No, I didn't. All the business was during the working day, and we went to lunch, and I paid for the lunch one day and—whether it amounted to \$2.25—and the next time he probably picked up the check. We had no social life, I mean in the evening.

Q. Did he live modestly, to your personal knowledge?

A. I believe he did.

Mr. Reed: That is all.

Mr. Burrell: No cross examination of this witness, your Honor.

(Testimony of Edward Anthony Syracuse.)

The Court: Thank you. May this witness be excused?

Mr. Reed: Yes, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Burrell: Your Honor, it is agreeable with [164] counsel that we recess until tomorrow, if that is the Court's pleasure. It is now 5:10.

The Court: This is a good time to recess; and then you will present the rest of your case tomorrow morning?

Mr. Reed: Yes, your Honor.

The Court: We will recess until 9:30. We will start reasonably promptly tomorrow. I don't think I will have to keep you waiting tomorrow morning.

(Whereupon, at 5:10 o'clock p.m., an adjournment was taken until 9:30 o'clock a.m., Wednesday, October 22, 1953.) [165]

The Clerk: Dockets 37940 and 41, Ruth Sterns and Cy Sterns.

The Court: Proceed with the case on trial.

Mr. Reed: Mr. Radke, will you please take the stand?

Whereupon,

RAY RADKE

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. State your name and address for the record.

(Testimony of Ray Radke.)

The Witness: Ray Radke. 3127 Castle Heights Avenue, Los Angeles 34.

The Court: Proceed, please.

Direct Examination

Q. (By Mr. Reed): Mr. Radke, what is your profession? A. Public Accountant.

Q. How many years' experience have you had as a public accountant?

A. Approximately 20 years.

Q. Please describe the nature of your work.

A. General accounting practice and tax service, such [168] as maintaining the complete sets of books, furnishing monthly profit and loss statements, handling all tax matters.

Q. What is your age? A. 47.

Q. Do you devote your full time to that profession? A. I do.

Q. Who is John Radke? A. My father.

Q. Was he in the same practice?

A. That is right.

Q. Did you succeed to his practice?

A. I did.

Q. Mr. Radke, I show you Respondent's Exhibit I and ask you if you have ever seen that before?

A. Yes, I have.

Q. What is it?

The books of the South Pacific Wholesale Company.

Q. Have you made a careful examination of that book? A. Yes.

(Testimony of Ray Radke.)

Q. I show you Respondent's Exhibits J, K, L and M. Are you familiar with these?

A. Yes.

Q. What are these?

A. Those are the office copies of their invoices, of the South Pacific Wholesale Company. [169]

Q. Did you engage in an examination of those records on behalf of the South Pacific Company when an investigation of those records was being made by the Bureau of Internal Revenue?

A. Yes, I did.

Q. The Petitioner in this business, Cyrus Sterns—I believe you heard the testimony—had a business arrangement with the South Pacific Wholesale Company? A. That is correct.

Q. I hand you Petitioners' Exhibits Nos. 11 and 12 and ask you if you are familiar with those.

A. Yes.

Q. Did you prepare them?

A. I helped prepare them.

Q. Were they prepared under your supervision?

A. They were.

Q. What do they purport to show?

A. Mr. Sterns' transactions as per the contract or agreement he had with the South Pacific Wholesale Company, and, in addition, items of income and expense furnished by Mr. Sterns, that were additional items of income and expense that were not reflected in the books of South Pacific.

Q. Did you endeavor in that investigation to arrive at Mr. Sterns' gross income and net income,

(Testimony of Ray Radke.)

such as a person employed to prepare his tax returns would do? [170]

A. Yes; that is the theory I used.

Q. For the year 1943, please turn to page 1 of Exhibit 11, the gross sales in the amount of \$201,098.96. In your opinion is that a proper recording of the sales that Mr. Sterns had?

A. To the best of my knowledge it is.

Q. The cost of goods sold, less inventory, at the end of the period of '43 leaves gross income of \$34,976.15. Is that a proper recording of his gross income for income tax purposes?

A. That was computed from all records available. In my opinion it is a proper amount.

Q. Further down, under deductions, there is a total deduction of \$37,595.88.

Mr. Burrell: If your Honor please, excuse me just a moment. This has not been offered in evidence, so I haven't had an opportunity to object to it as being offered as such.

Mr. Radke has testified there are in these exhibits items of income and expense which are taken not from these records——

The Court: This is Exhibit 11 which was received in evidence yesterday.

Mr. Burrell: Your Honor may recall it was later stricken except for the portion in the later part.

The Court: No, it wasn't stricken. I asked you [171] what you meant in objecting to something that was inquired into yesterday about commissions. Now, I am quite sure this exhibit hasn't been

(Testimony of Ray Radke.)

stricken. You should have objected to the receipt in evidence of the document.

Mr. Burrell: I think my objection will be on the record, as to all portions other than the part we were referring to when it was put in, your Honor.

The Court: I am sorry, I will have to differ with you, because I would not have received the document in evidence if you had made that objection.

Mr. Burrell: At this time I will object to Mr. Radke testifying to items of income and expense which are not taken from records he examined, and which are furnished to him by Mr. Sterns, which is in no form before the Court.

The Court: Your objection is well taken.

Mr. Reed, you can't meet your burden of proof by submitting only a typewritten recapitulation of material that involves conclusions as to facts.

Mr. Reed: Yes, your Honor.

The Court: Yesterday Exhibit 11 was offered. And with it Exhibit 10 relating—I guess it is Exhibit 12, relating to 1944.

We also received two supporting exhibits, 13 and 14, invoices of the South Pacific Company, which supported schedules which appear at the back of these two exhibits, [172] 11 and 12.

Now, we will have to clarify the status of these exhibits now. You have a copy of the Exhibit 11, do you, Mr. Reed?

Mr. Reed: Yes, before me, your Honor.

The Court: Mr. Burrell, you have a copy of Exhibit 11?

(Testimony of Ray Radke.)

Mr. Burrell: Yes.

The Court: I asked you to number the pages of these exhibits yesterday. At what point, Mr. Burrell, do the tabulations in Exhibit 11 represent a summary of the invoices which are in evidence as 13 and 14?

Mr. Burrell: In Petitioners' Exhibit 11, commencing at page 14, continuing to page 15, is the recapitulation of, I believe, the original invoices which are referred to in the other exhibits.

The Court: As I understand, you have no objection to the figures set forth on pages 14 through 18 of Exhibit 11, is that correct?

Mr. Burrell: 14 and 15, your Honor. And page 16 is agreeable. Page 17 is a different matter and it is not agreeable to the Respondent.

We will stipulate then to the accuracy and admissibility of pages 14, 15 and 16.

The Court: But not 17 and 18? [173]

Mr. Burrell: No, your Honor.

Mr. Reed: I believe with Mr. Radke's help, your Honor,——

The Witness: Thank you, Reed. I know you will straighten this out the best way you can in few minutes. But I am not quite ready yet.

Now, with respect to Exhibit 12, what is your objection to that exhibit, Mr. Burrell?

Mr. Burrell: May I put it this way, your Honor: We will stipulate to the accuracy of the recapitulation appearing on page thereof as being a summary

(Testimony of Ray Radke.)
of the original invoices already introduced in evidence. But to nothing more in that exhibit.

The Court: That is all?

Mr. Burrell: That is all, your Honor.

The Court: Then I will ask the Clerk to stamp on page 9 of Exhibit 12 for identification, and receive in evidence page 9. The rest is for the present excluded from evidence. The whole exhibit is marked as one for identification.

The Clerk: What will this be marked, your Honor?

The Court: Page 9 will be stamped Exhibit 12; instead of the whole document being the exhibit that one page is Exhibit 12. Do you understand?

The Clerk: Yes. [174]

The Court: In Exhibit 11 for identification, pages 14, 15 and 16 will be Exhibit 11. Mr. Baird, stamp each of those pages 14, 15 and 16 Exhibit 11. Then the rest of Exhibit 11 for identification has to be proved.

Mr. Burrell: Your Honor please, I have no desire to make this difficult.

The Court: That is the only thing I can do under the circumstances, and to save the record. We will go ahead. You can work out anything else you want during the recess.

Proceed, Mr. Reed.

Mr. Reed: I was going to suggest a short recess to give Mr. Radke an opportunity to help me get the documentary supporting evidence for this, so we can present it.

(Testimony of Ray Radke.)

The Court: You do that now. Anything you can agree to that is important, go ahead and agree to it.

Mr. Reed: Mr. Radke, will you step down?

(Short recess taken.)

The Court: Have you accomplished something during the recess on this matter of checking back on supporting records?

Mr. Reed: I am very sorry, your Honor. We seem to be left in somewhat of a state of confusion. It appears that the miscellaneous checks we have for expenses outside the business are not all acceptable to Respondent.

The return shows approximately \$7,000.00 of [175] expenses claimed by Mr. Sterns that would be expenses incurred outside of the South Pacific matters, and I believe the record shows he had certain additional losses for 1944 that were not included in deductions in his 1944 return, so presently I believe that I should rest my case.

The Court: You should rest?

Mr. Reed: Yes.

The Court: And have Respondent go ahead with what he has?

Mr. Reed: Yes. I believe the state of the record will show the returns filed by the Petitioner were substantially correct. Other losses that have been testified to would further reduce the income as shown in those returns, such as the \$20,020.00, and so forth.

The Court: What are you going to do about the balance of Exhibits 11 and 12 that have been left

(Testimony of Ray Radke.)

in the status of marked for identification only?

Mr. Reed: I would withdraw those.

The Court: You would just rely on the return as it has been made up?

Mr. Reed: Yes.

The Court: Does your accountant have anything to suggest?

Mr. Reed: Mr. Radke, could you suggest something?

The Witness: I think that is as fair to one as it [176] is to the other; very equitable, your Honor.

Mr. Reed: Do you have any suggestion, Mr. Burrell, other than what I have said?

Mr. Burrell: I have no suggestion to make. It is your case, Mr. Reed.

The Court: Well, originally you intended calling Mr. Radke.

Mr. Reed: Yes, and——

The Court: Anyone else?

Mr. Reed: No,—originally I had Mr. Ross. He has already testified. I have no other witnesses.

The Court: No other witnesses except Mr. Radke?

Mr. Reed: That is right, your Honor. I would like to, before the hearing closes, put Mr. Sterns back on the stand for one or two questions.

The Court: Do you want to ask him those questions now?

Mr. Reed: All right.

The Court: All right.

Mr. Reed: Mr. Sterns, will you take the stand?

(Testimony of Ray Radke.)

The Court: Let the record show for the present there are no other questions to be asked Mr. Radke.

(Witness excused.) [177]

Whereupon,

CYRUS STERNS

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Reed): Mr. Sterns, I believe you previously testified that you borrowed money from Oscar Ross. How much did you owe him on December 31, 1944? A. About \$32,000.00.

Q. Do you still owe him? A. Yes, I do.

Q. Approximately how much?

A. About \$32,000.00—\$33,000.00.

Mr. Reed: That is all.

The Court: Do you want to ask Mr. Sterns any questions about this?

Cross Examination

Q. (By Mr. Burrell): I understand you just now testified at the end of '44 you owed Mr. Ross the sum of \$32,000.00? A. \$33,000.00.

Q. Did you hear Mr. Ross' testimony yesterday?

A. I did. [178]

Q. He testified that of all the moneys he loaned you in '43 and '44 you repaid them in those years?

A. I heard him testify that. The man is a very

(Testimony of Cyrus Sterns.)

wealthy man and \$32,000.00 to him doesn't mean anything.

Q. It is your testimony now he was not testifying correctly?

A. He may have overlooked it. I am not going to say he deliberately testified falsely.

Q. Do you have records here in court to prove the \$32,000.00 to which you are now testifying?

A. I do not.

Mr. Burrell: That is all, your Honor.

The Court: Mr. Sterns, did you give Mr. Ross a note or notes?

The Witness: Your Honor, this was all done in more or less in confidence——

The Court: I assume you didn't give any notes?

The Witness: No, your Honor. In fact, in '46 he loaned me a thousand dollars which we have a copy of the stub of the check.

The Court: That is all. You may step down.

(Witness excused.)

The Court: You may proceed, Mr. Burrell, with Respondent's case.

Mr. Burrell: I would like to call to the witness stand at this time Luther J. Smith.

Whereupon,

LUTHER J. SMITH

called as a witness for and on behalf of the Respondent. have been first duly sworn, was examined and testified as follows:

(Testimony of Luther J. Smith.)

The Clerk: Please be seated. Please give your name and your address for the record.

The Witness: Luther J. Smith. 918 South Hudson Avenue, Los Angeles 38.

Direct Examination

Q. (By Mr. Burrell): Mr. Smith, are you appearing here in response to a subpoena?

A. I am.

Q. Where were you located and in what business in the years 1943 and 1944?

A. In 1943 I owned the DeAnza Cafe. I believe the address was 678 South Alvarado.

Q. In Los Angeles? A. In Los Angeles.

Q. In 1944 did you have any other location or business?

A. In 1944, it was in the 6900 block on Santa Monica Boulevard, Los Angeles.

Q. What was the name of your business at that location? [180] A. The Hollywood Cafe.

Q. Are those the only two businesses which you had during those years? Did you have any other business?

A. No, that is all. That is all.

Q. In the course of your operation of the DeAnza Cafe, did you contact or were you contacted by the Petitioner Mr. Sterns or any of his representatives?

A. I was contacted by his representative.

Q. What happened at that time?

The Court: Now, by whom were you contacted?

(Testimony of Luther J. Smith.)

You were contacted by representatives. Can you be more specific on that?

Q. (By Mr. Burrell): Can you remember the name of the person who contacted you?

A. No, not at this moment.

Q. Did you know he was a representative at that time of Mr. Sterns?

A. I knew he was a representative of a liquor company.

Q. Did you know of what liquor company?

A. At that time I did not.

Q. What transaction at that time happened between you and this person?

A. Well, this person, we were talking about the liquor being shortage, and he told me he could get me, I [181] believe it was 50 cases of whiskey.

Q. Did you pay him any money? A. Yes.

Q. How much?

A. Well, I believe it was between fourteen and sixteen hundred dollars.

Q. How did you pay it to him?

A. In cash.

Q. Did you get a receipt? A. No.

Q. What did you do thereafter in respect of that transaction?

A. Well, it was quite a while and I didn't receive any whiskey, so in the meantime I sold the DeAnza and that was in November of '43. And then I got in contact with this man that I gave the money to——

(Testimony of Luther J. Smith.)

The Court: How could you get in contact with him if you didn't know his name?

The Witness: He stayed at the bowling alley, more or less, on the corner of Eighth and Alvarado.

The Court: What did you call him, Dick or Joe?

The Witness: That I don't remember.

The Court: You called him something, didn't you?

The Witness: Yes, but I don't remember.

The Court: Go ahead. [182]

Q. (By Mr. Burrell): You did contact the identical person with whom you dealt earlier?

A. That is right.

Q. Then what happened?

A. And he gave me Mr. Sterns' address out on Santa Monica Boulevard. I believe it was about the 8600 block.

Q. What did you do?

A. Well, I went there several times.

Q. To Mr. Sterns' address?

A. To Mr. Sterns'.

Q. Did you see Mr. Sterns? A. Yes.

Q. Did you talk with him? A. Yes.

Q. What happened in you discussions with Mr. Sterns?

A. Well, he says, "Now, you haven't got a license now."

And I says, "Well, I will be getting a license in a few months."

So along in March, I believe it was March of '44

(Testimony of Luther J. Smith.)

is when I took over the Hollywood Cafe, in the 6900 block on Santa Monica Boulevard, and I went to see Mr. Sterns several times. Whiskey was getting shortage, and one day——

Q. What was the connection, Mr. Smith, between this fourteen to sixteen hundred dollars cash you gave this [183] unidentified person and Mr. Sterns with whom you later had discussions?

A. Repeat that, please.

Q. What is the connection between this unidentified person, with whom you had your first contact, and Mr. Sterns with whom your later discussions occurred, in regard to whiskey? What is the connection between them?

A. This man, I guess, was working for Mr. Sterns.

Q. How do you gather that?

A. Well, I was told that.

Q. Did you discuss with Mr. Sterns this fourteen to sixteen hundred dollars cash you had put up with this unidentified person?

A. Yes.

Q. What did Mr. Sterns say?

A. He had me on his list, that I had given this man money.

Q. He acknowledged you had paid this amount of money and he had it on a list of his?

A. I don't know how much Mr. Sterns had on his list.

Q. Did he represent to you that he owed a duty to you to deliver some whiskey?

A. That is right.

(Testimony of Luther J. Smith.)

Q. He acknowledged his obligation to you for delivery of whiskey? [184]

A. That is right.

Q. In respect to that cash you had paid to this unidentified person? A. That is right.

Q. Go ahead. What happened? Taking it up where you are now having discussions with Mr. Sterns and you have now got the Hollywood Cafe, what happened thereafter?

A. Well, before I missed out a paragraph there.

Before I taken out, taken over the Hollywood Cafe, I was talking to Mr. Sterns and I give him a check for approximately \$1,300.00 more.

Q. You gave a check to Mr. Sterns in that amount? A. Yes.

Q. Approximately \$1,300.00?

A. That is right.

Q. Refreshing your recollection, Mr. Smith, could it have been \$1296.00?

A. Well, I couldn't say exactly what it was. I would say around \$1,200.00.

Q. You said \$1,300.00 a moment ago.

A. Between twelve and thirteen hundred.

Q. Go ahead.

A. When I had the Hollywood Cafe at Santa Monica Boulevard I saw Mr. Sterns several times, and, why, one day I got in five cases of whiskey.

Q. Do you know what kind of whiskey?

A. Well, it was either Rocky Springs or Clayton: I am not sure.

Q. Did you pay anything more for that whiskey

(Testimony of Luther J. Smith.)

at the time you got it? A. \$300.00.

Q. \$300.00 for five cases? A. That is right.

Q. \$60.00 a case? A. That is right.

Q. Do you know to whom you paid that \$300.00?

Whom did you pay the \$300.00 to?

A. Someone that delivered the whiskey.

Q. You don't know who it was?

A. No, I don't.

Q. What happened thereafter?

A. Well, then in about, oh, I would say another month or maybe another six weeks I got in touch with Mr. Sterns again and he told me to go down to the warehouse, down around—I don't know——

Q. What was the name of it? Was it the South Pacific Wholesale Company warehouse?

A. Warehouse, yes.

The Court: Do you know or don't you know?

The Witness: It was South Pacific Warehouse, but I [186] don't know the address.

The Court: All right. Go ahead.

The Witness: I went down there and I believe I picked up 35 cases, I am not sure.

Q. (By Mr. Burrell): I will hand you Exhibit H, the first page thereof, which purports to be an invoice of South Pacific Wholesale Company, bearing the name of Luther J. Smith on its face. You will note the date shown thereon is May 2, 1944. How many cases are indicated in that invoice?

A. 30 cases.

Q. Does that refresh your memory now? You believe the 30 cases is correct? A. Yes.

(Testimony of Luther J. Smith.)

Q. What brand is shown in that invoice?

A. Rocky Springs.

Q. Is that correct? A. That is right.

Q. What is the unit price shown there, cost to you, of that whiskey? A. \$30.08 a case.

Q. Is there anything else shown on the invoice that you purchased—I am sorry. I am looking at another line.

What is the total amount of that invoice?

A. \$1,086.00. [187]

Q. Did you pay that amount directly to South Pacific Wholesale Company, pursuant to this invoice?

A. No, I didn't give them anything.

Q. Is it then your testimony that the total amounts of money you paid for the receipt of these 30 cases of Rocky Springs whiskey was the sum of fourteen hundred to sixteen hundred dollars in cash you paid earlier, and the sum of between twelve hundred and thirteen hundred dollars you paid directly to Mr. Sterns? A. That is right.

Q. Was it your understanding and knowledge at the time of this transaction that you were paying considerably in excess of the OPA legal maximum for this liquor?

A. I understood it was going to cost me \$45.00 a case.

Q. Did you know what the legal maximum was for the whiskey? A. No, I didn't.

Q. Did you know it was less than what you were paying?

(Testimony of Luther J. Smith.)

A. No, I didn't know that.

Q. You do know how much you paid for this whiskey.

A. That is right.

Q. What is the total sum you paid for this whiskey? Can you give us that figure?

A. Well, it was approximately in cash around \$1,400.00. And then around \$1,300.00 with a check.

Q. It is your testimony you paid approximately \$2,700.00 for these 30 cases of Rocky Springs whiskey invoiced from South Pacific to you for \$1,086.00? Is that your testimony?

A. Well, I think I got 35 cases.

Q. You did——

The Court: Don't argue with your witness.

Q. (By Mr. Burrell): When you say 35 cases, are you referring to additional five cases you thought was either Rocky Springs or Clayton you paid the driver \$300.00 for?

A. That is right.

Mr. Burrell: I believe that is all.

Cross Examination

Q. (By Mr. Reed): Mr. Smith, when the liquor was delivered to you, did you receive an invoice, a copy of this (indicating)?

A. No, I don't think so.

Q. Who delivered it to you?

A. One of the men working for Mr. Sterns.

Q. How do you know he was working for Mr. Sterns?

A. Well, he told me he was.

(Testimony of Luther J. Smith.)

Q. This first payment, when you gave this stranger whom you can't identify the money, how do you know he had a connection with Mr. Sterns? How do you know that Mr. [189] Sterns got that money?

A. That I don't know. All that Mr. Sterns had was he had it on the list, that I had gave him money.

Q. How many times did you see Mr. Sterns during 1944?

A. Oh, I would say three times.

Q. Would you have remembered him if you hadn't seen him in the courtroom here being referred to as Mr. Sterns?

A. No, I wouldn't.

Q. Did you get this Clayton whiskey from Mr. Sterns?

A. I did.

Q. Are you sure?

A. Well, the five cases I am sure.

Q. Mr. Smith, is this your signature (indicating)?

A. Yes, my signature.

Q. Would you like to write it again, please?

A. (Witness complies.)

Mr. Reed: They correspond all right.

Q. (By Mr. Reed): Mr. Smith, I believe you said you hadn't seen this before.

A. This (indicating)?

Q. Yes.

A. Well, I saw it when I picked up the whiskey at the warehouse; when I signed for it.

Q. I believe this reads, "The undersigned expressly [190] represents that he has not paid or

(Testimony of Luther J. Smith.)

agreed to pay any money or consideration whatsoever for the merchandise set forth above other than the invoice price set forth above and agrees not to pay any other or additional consideration for said merchandise.

“If any price or consideration in addition to that set forth on this invoice is requested for the merchandise do not pay the same and notify the South Pacific Wholesale Company immediately of such request.

“I have read and understand the foregoing and agree to the same.”

In view of that, would you like to change your testimony about what you paid Mr. Sterns for the liquor?

A. Well, when I went to pick this up, this liquor, I didn't pay anything for that. I just signed for it. That looks like the copy there I signed (indicating).

Q. Let me see. You made three payments, the first one was for how much?

A. The first was around \$1,400.00. I am not sure. I am not sure. I said around \$1,400.00.

Q. You paid it to an unknown person?

A. That is right.

Q. You wouldn't know him if he walked in here?

A. Well, I believe I would.

Q. How did you connect him up with Mr. Sterns? [191]

A. Well, at that time, at that time I didn't know Mr. Sterns at that time.

(Testimony of Luther J. Smith.)

Q. What makes you believe Mr. Sterns got that money?

A. I couldn't say Mr. Sterns did get that money.

Q. You said here that you paid three times for this liquor in a total amount that slips my mind at the moment, but it was way over the ceiling price, and here you state you agree to notify South Pacific if such a demand was made upon you.

I am not trying to confuse you. I am trying to determine exactly what you know Mr. Sterns got from you. He is the man on trial here. We want to be sure of what he received from you. We don't want him to be charged with having received more than you actually delivered to him, that you know he received.

A. Well, the man I give the \$1,400.00 to, how much of that he gave Mr. Sterns I do not know.

Q. And the second payment, whom did you make that to?

A. I made that to Mr. Sterns.

Q. That was in what amount?

A. Oh, approximately \$1,300.00.

Q. It couldn't have been \$1,200.00?

A. I don't remember. I said between twelve and thirteen hundred dollars. That was a check made out on the 7th and Alvarado—— [192]

Q. Did that include payment for the five cases of Clayton you say you received?

A. No, it did not.

Q. The Clayton whiskey was paid for in addition to that?

A. That is right.

(Testimony of Luther J. Smith.)

Q. You paid Mr. Sterns for that?

A. I paid the driver for that.

Q. What denominations were those bills you paid Mr. Sterns, that twelve or thirteen hundred dollars? I believe you testified you paid him in cash.

A. Mr. Sterns?

Q. Yes.

A. No. I said I give him a check for that.

Q. Oh, you gave him a check. I beg your pardon.

A. Yes.

Mr. Reed: That is all.

Mr. Burrell: That is all for this witness.

The Court: This witness can be excused, can he?

Mr. Burrell: Yes.

Mr. Reed: Yes.

The Court: You are excused. Thank you for giving your testimony to the Court.

(Witness excused.)

Mr. Burrell: Respondent would like to call to the [193] witness stand John Randolph.

Whereupon,

JOHN H. RANDOLPH

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address for the record, please?

The Witness: John H. Randolph. 4678 La Mirada, Los Angeles 29.

(Testimony of John H. Randolph.)

Direct Examination

Q. (By Mr. Burrell): Are you here in response to a subpoena? A. Yes.

Q. Where were you located and in what business during the years 1943 and 1944, Mr. Randolph?

A. Part of '43 and part of '44 I was located at, I think the address was 6160 Hollywood Boulevard, called the Sportsmen's Club, originally called the Foreign Club.

Q. In the course of the operation of that business, did you contact or were you contacted by Mr. Sterns? A. I contacted Mr. Sterns.

Q. Personally? A. I telephoned.

Q. By telephone? [194] A. Yes.

Q. Did you recognize his voice? Did you know with whom you were dealing?

A. No, I did not.

Q. What transpired in that telephone conversation? A. Well, it was through——

Mr. Reed: Objection, your Honor. I don't think this is pertinent. He hasn't identified who he talked with on the phone.

The Court: Read back the answer.

(The record was read.)

The Court: Objection sustained.

Q. (By Mr. Burrell): Did you ever have any personal discussions with Mr. Sterns under circumstances where you knew him and knew with whom you were dealing?

A. Well, I mean he called at my place of business.

(Testimony of John H. Randolph.)

Q. Personally? A. Personally.

Q. Identified himself as Mr. Sterns?

A. That is right.

Q. Would you recognize the gentleman now if you saw him?

A. I don't know whether I would or not. That was about eight or nine years ago. [195]

Q. Did you pay any money to this gentleman who identified himself as Mr. Sterns?

A. I did.

Q. How? A. Cash.

Q. How much and when?

A. It ran between five hundred and six hundred dollars. I don't recall when it was. I did give that information to some fellows that came out to see me from the Collector of Internal Revenue some time ago.

Q. What did you understand that you were paying this money for?

A. Well, I was to get some liquor. That was to be the additional cost of the liquor.

Q. Did this gentleman who identified himself as Mr. Sterns represent that he could arrange for you to have a supply of whiskey?

A. Yes, he did.

Q. That is the reason you paid this money to him? A. That is right.

Q. Did you receive any whiskey?

A. I didn't for quite a while. I kept calling him. I suppose I talked to Mr. Sterns, I don't know—I talked to somebody who represented himself as Mr.

(Testimony of John H. Randolph.)

Sterns and finally I got somewhere between three and six cases of [196] liquor, which were delivered to me in the evening, which I paid cash for and was told that due to the fact that his license——

Mr. Reed: Objection, your Honor. This witness hasn't identified Mr. Sterns. There is no evidence to indicate that he is testifying about the Petitioner in this case.

The Court: Do you know who brought the three to six cases of liquor to you?

The Witness: Well, I would say it was Mr. Sterns brought it about 6:00 o'clock in the evening.

The Court: How did he bring them to you?

The Witness: In his car.

The Court: All right. Objection overruled.

Q. (By Mr. Burrell): Did you thereafter receive deliveries of whiskey from the South Pacific Wholesale Company? A. I did.

The Court: This will be in addition to some whiskey that was brought to you by someone in an automobile, or are you talking about the same whiskey?

The Witness: No. I thought he questioned me—will you ask the question again?

Q. (By Mr. Burrell): Did you thereafter receive any whiskey in addition? [197]

A. Additionally, yes; that is what I thought——

Q. Did you receive invoices from the South Pacific Wholesale Company? A. I did.

Q. Did you pay for those invoices?

A. I paid for them in check.

Q. You pay for those invoices in full?

(Testimony of John H. Randolph.)

A. Yes, sir, for the amount of the invoice.

Q. In addition to paying those invoices in full, you paid in cash to a gentleman representing himself as Mr. Sterns sums of money in addition?

The Court: That is a leading question. The witness has not testified to that effect. I understand that he paid somebody between five hundred and six hundred dollars, for which he got between three and six cases of liquor.

The Witness: No. May I correct that statement, your Honor?

The Court: You had better make yourself clear about that.

The Witness: I paid him cash for the liquor, those three to six cases of liquor he brought to me.

The Court: How much did you pay for them?

The Witness: That I don't know. I never had an invoice.

The Court: You don't know whether you got three, [198] four, five or six cases?

The Witness: No, that was a long time ago. I submitted my records to the Collector of Internal Revenue. It was on my records.

The Court: Does the agent now have your records?

The Witness: No, my records were destroyed. I mean this was in '43 and '44. They do have some check records, if that is what you want.

The Court: Who did you pay between five and six hundred dollars to somebody for?

The Witness: To get some liquor.

(Testimony of John H. Randolph.)

The Court: How much did you pay for the liquor that you say was in an amount of between two and three and six cases?

The Witness: I say I couldn't remember what I paid for that.

The Court: I just wanted to be sure. I am trying to follow your testimony.

The Witness: Excuse me.

The Court: I am making notes on your testimony.

The Witness: I never got an invoice on those first cases of liquor.

The Court: Go ahead, Mr. Burrell.

Q. (By Mr. Burrell): In respect to the five to six hundred dollars cash [199] you paid to this man representing himself as Mr. Sterns, did you ever receive any refunds of that amount?

A. No, sir.

Mr. Reed: Your Honor, I object to this testimony. Apparently, there is better evidence than Respondent has produced. If this witness has books, invoices, checks and so forth, I think they should be brought into court. His memory is vague and somewhat indefinite about these items.

The Court: Do you have any——

Mr. Burrell: He has testified, your Honor, that the records were destroyed. We do not have those records. We have the invoices, of course, in Respondent's Exhibit H from South Pacific Wholesale Company for all the whiskey delivered by them to

(Testimony of John H. Randolph.)

Mr. Randolph. As a matter of fact, we have photo-stats of checks we will introduce.

Q. (By Mr. Burrell): I will hand you Respondent's Exhibit H, which contains a number of invoices from South Pacific Wholesale Company to you. You have already testified that you paid the full amount of those invoices.

Mr. Burrell: Will you please mark this?

The Clerk: Respondent's Exhibit N for identification.

(The document above referred to was marked Respondent's Exhibit N for identification.)

Q. (By Mr. Burrell): I hand you what is marked Respondent's Exhibit N for identification, and ask you what they are.

A. These are checks. I haven't analyzed—I think they could tie in with the invoices.

The Court: How many invoices are there for sales? This is part of Exhibit H (indicating).

The Witness: The first invoice is five cases for \$136.95.

The Court: What is the date of that invoice?

The Witness: October 4th. My check is dated October 4th, \$136.95.

Q. (By Mr. Burrell): Was that in payment of that invoice, Mr. Randolph?

A. I would say it was. I mean it is made payable to the South Pacific Wholesale Company.

The next invoice here is dated January 6th for ten cases for \$296.50.

(Testimony of John H. Randolph.)

The Court: What date is that invoice? You don't have to take them in order. Give me the date.

The Witness: This is dated January 6th for \$296.50, check made payable to the South Pacific Wholesale.

The Court: January 6th of what year, Mr. Burrell?

The Witness: 1944. Another one on January 6, 1944, \$296.50, check dated—just a minute. [201]

Mr. Reed: '43.

The Witness: That must be a mistake. I wasn't in business in 1943.

The Court: Was there a check in payment of this other purchase on January 6, 1944?

The Witness: Yes, your Honor.

The Court: What is that?

The Witness: For \$296.50.

The Court: Well now, we have three checks of this witness that have be explained. How many other checks are there?

Mr. Burrell: One for each of the invoices, your Honor; three more.

The Court: Without taking the time to read this all into the record, do the checks correspond to the invoices?

Mr. Burrell: Yes.

The Witness: Yes, they do.

The Court: Then we don't have to go through all this.

Mr. Burrell: I will offer Respondent's Exhibit N in evidence at this time, your Honor.

(Testimony of John H. Randolph.)

The Court: Any objection?

Mr. Reed: No objection.

The Court: Respondent's N is received in evidence.

(The document heretofore marked Respondent's Exhibit N was received in evidence.) [202]

Q. (By Mr. Burrell): Was it your understanding that you paid the five or six hundred dollars——

The Court: That is a leading question. Ask him about a fact. Ask him to testify about a fact.

Q. (By Mr. Burrell): What was your understanding of the reason why you were paying five to six hundred dollars to some person with respect to future liquor deliveries?

A. That was the only way I could get liquor in my connections. I was new in the business. I understand I would have to pay over the ceiling price in order to get whiskey.

Q. Did that sum represent over the ceiling price?

A. Yes, it did.

Mr. Burrell: That is all.

Cross Examination

Q. (By Mr. Reed): Mr. Randolph, did you ever receive national brand liquor from Mr. Sterns?

A. National brand?

Q. Old Crow, Haig & Haig pinch bottle, or any of the old men?

A. Not to the best of my knowledge.

Q. Did you ever receive an evening delivery in response [203] to a telephone call from you, urging

(Testimony of John H. Randolph.)

Mr. Sterns to deliver to you any national brands?

A. I don't believe it was national brands. That is the one I don't have the invoice for. I testified that I received a delivery in the evening, but what the brand was I don't know.

Q. What did you pay for that? Could that have been that five or six hundred dollars?

A. No. I paid cash for it.

Q. Did you treat that five or six hundred dollars that you say you paid for getting liquor, did you treat that as business expense in your own records?

A. It was money taken out of the business to pay for it, yes.

Q. Did the Revenue Bureau allow it as expense?

A. I don't know. Some of the checks I drew to myself and that \$500.00, I don't know how that was treated.

Q. Are you sure you gave the five or six hundred dollars to Mr. Sterns?

A. I am reasonably positive.

Q. But you are not sure that you would know Mr. Sterns if he came in the room here?

A. Well, I say it has been about nine years since I have seen the man.

Q. Do you see him in the room? [204]

A. Do I see him in the room?

Q. Yes. A. Yes.

Q. Would you know him if you passed him on the street?

A. I testified if I had passed him on the street I don't think I would have known him.

(Testimony of John H. Randolph.)

Q. What did you pay for the national brand liquor that was delivered to you?

A. I said I don't remember.

The Court: He didn't say he got any national brand liquor, Mr. Reed.

The Witness: No.

The Court: He didn't admit he received any national brand liquor. What liquor are you referring to?

Mr. Reed: I am referring to the evening delivery.

The Witness: That is right. The liquor was delivered to me in the evening, and what the brand was I don't recall. And I paid for it in cash.

The Court: Now, you don't recall what the brand was?

The Witness: No, your Honor.

Q. (By Mr. Reed): Mr. Randolph, you do not know definitely whether or not you paid that money to Mr. Sterns? A. That first money? [205]

Q. Yes.

A. Well, I am reasonably sure, after seeing him here again today and yesterday.

Q. You paid it in cash? A. Cash.

Q. What denominations?

A. I don't know. That is nine years ago.

Q. How do you remember it was five or six hundred dollars then?

A. Well, at the time, the reason I remember that is because it was shortly after I was out of business that the Collector of Internal Revenue—and those things were fresh in my memory. Today some of

(Testimony of John H. Randolph.)

those things have slipped my memory, when you are not in the same line of business.

Q. The Collector of Internal Revenue audited your returns and you claimed this five or six hundred dollars expense?

A. It was taken out of my cash.

Q. But do I understand you to say you remembered it at that time because your returns were audited and you claimed it as an expense?

A. Well, that I couldn't—

The Court: Let me ask you this question:—I think the question can be reframed in this way—What was the occasion for your telling a revenue agent you had made [206] some payment of five or six hundred dollars to Mr. Sterns? What was the occasion for that?

The Witness: The occasion was they came over to my office and showed me some invoices from South Pacific, and asked me to bring my records over to the office where they could inspect them. And at that time they asked me for a statement of the facts, and I gave them a statement of the facts.

The Court: That is the time you mentioned the payment of five or six hundred dollars?

The Witness: Yes, your Honor.

Q. (By Mr. Reed): Do you have a copy of that statement you gave the Bureau?

A. I think the Bureau has a copy of it.

Q. Was it a sworn statement?

A. No, it was not a sworn statement.

(Testimony of John H. Randolph.)

Q. No stenographer was taking down the transcript?

A. I think it was written in my longhand, in my writing.

Q. Mr. Randolph, in the subsequent purchases from South Pacific or from Mr. Sterns, do those canceled checks represent the ceiling price?

A. To the best of my knowledge they were ceiling prices. They were the exact amount of the invoices, yes, sir.

Mr. Reed: That is all. [207]

Mr. Burrell: That is all, your Honor.

The Court: May this witness be excused?

Mr. Reed: Yes.

Mr. Burrell: Yes.

The Court: You are excused. And thank you for appearing in court.

(Witness excused.)

Mr. Burrell: I would like to call Mr. Robert E. McClain at this time.
Whereupon,

ROBERT E. McCLAIN

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows.

The Clerk: Please be seated. Please state your name, Mr. Witness, and your address.

The Witness: Robert E. McClain. Blue Jay, California.

(Testimony of Robert E. McClain.)

Direct Examination

Q. (By Mr. Burrell): Mr. McClain, are you here in response to a subpoena? A. Yes.

Q. What is your business and where was it located during the years 1943 and 1944? [208]

A. In San Bernardino, at 469 Third Street.

Q. What was the name of the business?

A. I called it the Hitching Post Cafe.

Q. During those years, did you buy any whiskey from the South Pacific Wholesale Company?

A. I had whiskey billed to me from the South Pacific Wholesale Company.

Q. I will hand you Respondent's Exhibit H, which contains a group of invoices from the South Pacific Wholesale Company.

Mr. Burrell: If your Honor will permit, I believe it will be of value in this case to have this witness read the pertinent data on these invoices.

The Court: Very well.

Q. (By the Burrell): Read the date of the invoices and the number of cases and the brand, the unit price, and the total amount.

A. Invoice No. 1639. January 27, '44. 50 cases, fifths, Rocky Springs, 85 proof, and unit price \$29.65. Total \$1,482.50.

Q. Go ahead. There are about five more.

The Court: What was the total amount?

The Witness: \$1,482.50.

Invoice No. 1556. January 12, 1944. 30 cases, quarts, U. D. L. Original, 85 proof, Straight Bour-

(Testimony of Robert E. McClain.)

bon. Unit [209] price \$43.80. Total amount \$1,314.00.

Invoice No. 1477, dated December 24, 1943. 20 cases, pints, U. D. L., 85 proof. Unit price \$44.70. Total amount \$894.00.

Invoice No. 37, dated October 7, 1943. 20 cases, fifths, Baltimore Club. Unit price \$27.39. Total amount \$547.80.

There is an extension here I don't know anything about. Do you want me to read that?

Mr. Burrell: It is penciled in. Let the record show there is a further extension in red pencil.

Q. (By Mr. Burrell): Go ahead. Read it for whatever it is worth.

A. \$496.40, and \$38.40.

Q. Designated as? A. Designated as tax.

The Court: The \$34.80 is tax?

The Witness: \$38.40 is designated——

The Court: \$38.40?

The Witness: Yes. That is designated as tax.

The Court: What is the \$496.40?

The Witness: It is in red pencil figures. I don't recognize it.

The Court: What is the amount of the invoice, please? [210]

The Witness: \$547.80, typewritten amount.

The Court: Disregard anything written in pencil. Go ahead now. What is the next one?

The Witness: Invoice 1104, dated November 5, 1943. 25 cases, fifths, Baltimore Club, 80.6 proof. Unit price \$27.40. Total amount \$685.00.

(Testimony of Robert E. McClain.)

Invoice 1139, dated 11-15-43. 20 cases, fifths, Rocky Springs, 85 proof. Price \$29.50. Total \$590.00.

Invoice 1165, 11-16-43. 80 cases, fifths, Rocky Springs, 85 proof. Unit price \$29.65. Total amount \$2,372.00.

Q. (By Mr. Burrell): Is that all of them, Mr. McClain?

A. Yes; I think there were seven invoices.

Q. Did you pay to South Pacific directly the amounts of these invoices? A. No.

Mr. Burrell: I will hand to the Clerk at this time a group of documents and ask they be marked for identification.

The Clerk: Exhibit O for identification.

(The documents above referred to were marked Respondent's Exhibit O for identification.)

Q. (By Mr. Burrell): Mr. McClain, I hand you Respondent's Exhibit O for [211] identification, and ask you to identify it.

The Court: Are those your checks, please?

The Witness: Yes.

The Court: Are those checks given in payment of the invoices?

The Witness: Yes.

The Court: Do they correspond to the invoices?

The Witness: Not in exact amounts.

The Court: All right. Show the checks, please, to Mr. Reed.

Mr. Reed: I have seen them, your Honor.

(Testimony of Robert E. McClain.)

Mr. Burrell: I will offer them in evidence at this time, your Honor.

The Court: Any objection?

Mr. Reed: No objection.

The Court: You don't object on the basis these are this witness' checks, do you?

Mr. Reed: Your Honor, no, they are not all his checks.

Inez McClain, by R. E. McClain, that isn't your check?

The Witness: It is signed by me.

Mr. Reed: Inez McClain, is that signed by you (indicating)?

The Witness: No, that is her check, my wife's [212] check.

Mr. Reed: Who is this one signed by (indicating)?

The Witness: My wife.

Mr. Burrell: There are two checks in this group——

The Court: To whom are those checks made payable?

Q. (By Mr. Burrell): To whom are those checks made payable, all checks?

A. One is made payable to Cy Sterns, one is made payable to cash, one is made payable to Cy Sterns, Cy Sterns.

Q. The one check made payable to cash, what endorsement name appears thereon? By whom is it endorsed?

A. It is endorsed by South Pacific Wholesale.

(Testimony of Robert E. McClain.)

Q. To whom did you deliver that check?

A. Mr. Sterns.

Q. Were all of these checks in this exhibit delivered by you to Mr. Sterns?

A. They were.

Q. Are all these checks drawn on your account in respect to the operation of your business?

A. Well, some of the money I got from my wife.

Q. Are they to pay——

A. They were for operating the place.

Q. Will you read the amounts of these checks, please?

The Court: And the dates.

The Witness: January 18, 1944, \$2,750.00. December [213] 16, 1943, \$3,200.00. November 10, 1943, \$4,350.00. November 6, 1943, \$1,950.90.

Q. (By Mr. Burrell): Do you know the total amount of these checks, Mr. McClain? Making a brief computation, what is the total amount of these checks? A. Approximately \$12,000.00.

Q. Making a brief computation of the total amount of the invoices you earlier read into the record, what is it?

A. Approximately \$7,800.00, something like that.

Q. What is your explanation of the difference of approximately \$4,365.00, Mr. McClain?

A. It was an overage paid for the delivery of whiskey.

Mr. Reed: Will you please repeat that?

The Witness: I said the difference was an overage paid for the delivery of whiskey.

(Testimony of Robert E. McClain.)

Q. (By Mr. Burrell): To whom did you pay that overage? A. Mr. Cy Sterns.

Q. Did you pay it to him personally?

A. I gave him these checks personally.

Q. Did you know at the time to whom you were paying it? A. Yes.

Q. Would you recognize the gentleman if you saw him [214] again? A. Yes.

Can you identify Mr. Sterns? A. Yes.

Q. You would have known him at all times since the transaction, would you? A. Yes.

Mr. Burrell: That is all.

Cross Examination

Q. (By Mr. Reed): Mr. McClain, what were the brands of whiskey you bought from Mr. Sterns?

A. Baltimore Club, Rocky Springs, and U. D. L.

Q. Did you ever receive some Old Taylor from him? A. No.

Q. Not 40 cases? A. No, sir, I didn't.

Q. Never? A. No, sir.

Q. What was the conversation when you delivered these checks that you say are in excess of these invoices?

A. Mr. Sterns gave me the amount of the merchandise on a memoranda, and I wrote him a check for it, filled out the check for it.

Q. Now, the payments you made to Mr. Sterns, did you [215] record them in your books for merchandise purchased?

(Testimony of Robert E. McClain.)

A. My records show the face of the South Pacific Wholesale invoices.

The Court: Let me just clarify that. You did keep records?

The Witness: Yes.

The Court: You say you entered on your records the amounts shown on the South Pacific invoices?

The Witness: That is right.

Q. (By Mr. Reed): What did you do with the balance? How did you treat the balance on your books?

A. I treated it as a gift or loss, or didn't show it at all.

Q. Did you claim it on your tax returns?

A. I did not.

Q. Did you make money in your bar?

A. Yes.

Q. What are your pouring costs?

A. That is a little hard to say. I imagine at that time they were around 40 per cent.

Q. Including this excess payment?

A. I don't know those figures exactly, because I haven't got them.

Q. Are you sure you received no other consideration [216] in payment of those checks?

A. That is right.

Q. How did you meet Mr. Sterns?

A. I met him in my place of business. He was introduced to me by two gentlemen.

Q. Who were they?

(Testimony of Robert E. McClain.)

A. Mr. Harry Griffin of San Bernardino, who was secretary of the Culinary Workers Union, and a Mr. Henderson or Hendrickson of Upland, who ran the Sycamore Inn, restaurant and cocktail lounge.

Q. What is the minimum a bar can operate profitably on pouring costs?

A. For a proper operation of whiskey, whiskey costs alone, or complete cost?

Q. Complete costs.

A. Pouring costs of liquor——

The Court: The two things are different, pouring cost and complete cost, aren't they?

Mr. Reed: He meant just the cost of the liquor, your Honor.

The Witness: The cost of liquor, what it costs to put together the drink, without ice and help, without labor?

Q. (By Mr. Reed): Yes.

A. To operate profitably, about 30 or 32 per cent. [217].

Q. With 40 per cent cost, you were losing money?

A. I wasn't losing a lot of money. I wasn't making a lot of money.

Q. Do your records show that you lost money in the business? A. No, I didn't lose it.

Q. Did you have substantial profits?

A. I wouldn't know whether they were substantial or I don't recall the exact figures. However, my records show that——

Q. If your pouring costs were 40 per cent and

(Testimony of Robert E. McClain.)

you couldn't operate profitably with pouring costs over 32 per cent, it appears you were conducting your business profitless.

A. I didn't operate a profitless business. Of course, I did a lot of the work myself and my wife worked in the business; we paid ourselves no salary.

Q. But yet you lost money when your pouring costs went over 32 per cent?

A. I said to operate a profitable business 32, 33 per cent pouring costs would be a profitable operation.

Q. What did you sell a shot of Rocky Springs for over the bar? A. 45 cents.

Q. What was the ceiling on it?

A. 45 cents. [218]

Q. Where did you take delivery of this liquor?

A. I took delivery, the first delivery I took from Mr. Cy Sterns at Upland. He called me on the telephone and told me he was delivering some liquor and he wanted to know if I could pick up mine. He had either 20 or 25 cases; I am not sure.

Q. That was the first?

A. That was Baltimore Club whiskey, I think.

The Court: Just for our records, how far is Upland from San Bernardino?

The Witness: Approximately 14, 15 miles.

Q. (By Mr. Reed): Was this your first invoice, October 26th?

A. That wasn't my invoice.

The Court: The first one is No. 1369.

(Testimony of Robert E. McClain.)

The Witness: That isn't the first invoice, either. They are not in date order.

The Court: The first one you read.

The Witness: The first one read, yes. I think this was the invoice, October 7, 1943 (indicating). I believe that was the first one.

Q. (By Mr. Reed): When did you pay for this?

A. I paid Mr. Sterns by check.

Q. On that date? [219]

A. As far as I know; as far as I remember.

Q. Well, which one of those checks?

A. I don't recall which check it would be.

Mr. Reed: Let the record show this invoice is dated October 7, 1943. There is no corresponding check. The check nearest to that date is dated November 6, 1943, a month later.

Q. (By Mr. Reed): When did you pay for this? You said you paid for it when it was delivered?

A. As near as I remember, I paid for all merchandise on delivery. I had ordered more than that amount of whiskey, so I don't recall the individual case.

Q. When you took delivery there in Upland, did you write out the check at the time you took delivery?

A. I don't remember. My impression was I gave Mr. Sterns a check at that time.

The Court: What do you mean by "at that time"?

The Witness: At the time I took delivery of the merchandise.

(Testimony of Robert E. McClain.)

The Court: At the time you took delivery. Did he then give you an invoice?

The Witness: No.

The Court: The invoice was mailed to you?

The Witness: Invoices were mailed to me. [220]

The Court: When you received them, were they marked paid?

The Witness: I don't recall. I believe the Alcohol Tax Unit has those invoices. I think they picked them up.

Mr. Reed: If your Honor please, if those invoices are in the possession of the Government, that is the best evidence.

Mr. Burrell: We do not have them, your Honor.

The Court: Those invoices would be presumably the duplicate copies of the invoices in Exhibit H?

Mr. Burrell: That is correct, your Honor.

The Court: Is it your understanding that your invoices added up to—how much did you say?

The Witness: Some seven thousand dollars.

The Court: My addition is \$7,885.30. Is that what you have, Mr. Burrell?

Mr. Burrell: Give me one second. I have \$7,885.30.

The Court: That is the addition I have.

Mr. Burrell: Has your Honor computed the amount of checks in Exhibit——

The Court: \$12,250.90.

Mr. Burrell: That is correct.

The Court: The difference would be \$4,365.60.

Mr. Burrell: Yes, your Honor. [221]

Mr. Reed: If your Honor please, I believe that

(Testimony of Robert E. McClain.)

you have the computation. Does the total of these checks correspond with the total of these invoices?

The Court: The total of the checks is \$12,250.90. The total of the invoices is \$7,885.30. The difference is \$4,465.60.

Q. (By Mr. Reed): Would it not be unusual, Mr. McClain, for you to pay for the whiskey before getting an invoice?

A. I very seldom did pay for any merchandise prior to delivery.

The Court: Prior to delivery of the merchandise?

The Witness: Prior to delivery of the merchandise.

The Court: Well, read the question, please.

(The question was read.)

The Court: Before getting an invoice?

The Witness: Yes, it would be.

The Court: It would be?

The Witness: Yes.

Q. (By Mr. Reed): Was it not against the law to take delivery of whiskey without an invoice from a licensor or licensee?

A. I don't know—the understanding I had, the whiskey would be billed to me through a licensed wholesaler, when I purchased it from Mr. Sterns.

Q. Is the next order here, dated November 11th, is that the next order, or November 15th? Will you pick out the next one, please?

A. October 7th, 11-5, 11-15, 11-16.

Q. Do you have a November 5th there?

(Testimony of Robert E. McClain.)

A. 11-5, I think; 11-5-43.

Q. Mr. McClain, did you ever receive any national brand liquor from Hendrickson?

A. No.

Q. You always bought your national brands from whom?

A. What do you mean by "national brands"?

Q. Recognized brands, like the Old Man, Old Crow, Old Taylor.

A. Simon Levi, McKesson & Robbins.

Q. There was never a shortage during this period that prompted you to get 40 cases of Old Taylor from Hendrickson?

A. No, I would have been glad to have had it.
The Court: What is the answer, yes or no?

The Witness: No, I didn't have it.

Mr. Reed: That is all.

Redirect Examination

Q. (By Mr. Burrell): Did you ever receive any refunds of the \$4,365.60, which you testified was overage paid to Mr. Sterns? A. No.

Q. Did you receive any additional whiskey or other consideration for that sum of money?

A. No.

Mr. Burrell: That is all.

The Court: With respect to that, the total amount of the checks that you paid to Mr. Sterns is \$12,250.90.

Let us put it this way: Did you ever get any refund of any of that amount?

(Testimony of Robert E. McClain.)

The Witness: No.

The Court: May this witness be excused?

Mr. Burrell: Yes.

Mr. Reed: Yes.

The Court: Thank you for appearing in court, Mr. McClain, and you are now excused.

(Witness excused.)

Mr. Burrell: Your Honor, the Government's case consists of one more witness, the agent.

The Court: You have no other general witnesses?

Mr. Burrell: No.

The Court: I think we will recess for lunch, until 1:30, if that is enough time for you gentlemen. We will finish this afternoon.

Mr. Burrell: Oh, yes. I would expect so easily.

The Court: You can leave your papers here. The courtroom door will be locked.

(Whereupon, at 12:30 p.m., a recess was taken until 1:30 p.m. of the same day.) [224]

The Court: You may proceed.

Mr. Burrell: Respondent will call to the witness stand O. E. Cummins.

Whereupon,

O. E. CUMMINS

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please? Please state your name and address for the record.

The Witness: O. E. Cummins; C-u-m-m-i-n-s.

(Testimony of O. E. Cummins.)

United States Post Office Building, Los Angeles, California.

The Court: I would like to ask you first, Mr. Burrell, if we understand what the determination of the Respondent is for 1943 and 1944.

According to the statement attached to the notice of deficiency, which is attached to the Petition, the Respondent has determined Mr. Sterns realized net income from his business in 1943 in the amount of \$160,492.21, one-half of which has been taxed to each Petitioner, is that right?

Mr. Burrell: Yes, your Honor. Statutory notice——

The Court: The salary item in Docket No. 37940 was \$1,005.63; salary of Mr. Sterns and Mrs. Sterns. That is the salary of Mrs. Sterns? [225]

Mr. Burrell: Yes, your Honor. That is indicated in the statement attached to the 90-Day Letter; in the other docket, at least.

The Court: What do we have there? You have waived the fraud penalty, so far as Mrs. Sterns is concerned, but no evidence has been introduced by the Petitioner relating to any salary of Mrs. Sterns.

That amount was reduced and apparently isn't in contest. That militated in the favor of Mrs. Sterns. I think that is right.

Mr. Burrell: I believe so, your Honor. Excuse me. Are we discussing the item——

The Court: I think it is perfectly clear. It took too much time. I will go on to the next one.

(Testimony of O. E. Cummins.)

In 1944 the Respondent has determined they had income realized by Mr. Sterns of \$75,615.24.

Mr. Burrell: Yes, your Honor.

The Court: Casualty loss deduction was allowed, and so that item isn't in question. Therefore, the determination is that in these two taxable years the Petitioner Mr. Sterns realized a total net income from his liquor business in the amount of \$236,107.45.

Upon what basis was that determined? What method did the Respondent use in making that determination?

Mr. Burrell: Do you want me to advise the Court [226] or Mr. Cummins to testify?

The Court: You advise the Court.

Mr. Burrell: On the reconstruction of the Petitioner's income by the method known as the bank deposits plus other undeposited identifiable sources of income, and adjustments to those items for such things as transfers and the bank deposits, loans identifiable, things of that sort, your Honor.

Also allowances have been made for cost of merchandise, expenses have been identified, refunds that the Petitioner may have made out of the bank deposits.

The Court: All right. Will you proceed now?

Mr. Burrell: Yes, your Honor.

Direct Examination

Q. (By Mr. Burrell): Mr. Cummins, what is your occupation?

(Testimony of O. E. Cummins.)

A. Internal Revenue Agent.

Q. For how long a time have you been an Internal Revenue Agent? A. 26 years.

Q. In the course of your occupation as an Internal Revenue Agent, were you assigned to investigate into the tax returns of Petitioners Cy and Ruth Sterns? A. I was.

Q. For the years 1943 and 1944? [227]

A. That is right.

Q. What is the date of that assignment? Can you give us an approximate date, without checking?

A. The latter part of '45 or early '46.

Q. For how long a time did you actively conduct this investigation?

The Court: Approximately, Mr. Cummins. These are just preliminary questions, sir.

The Witness: Approximately 190 days.

Q. (By Mr. Burrell): We already have in evidence the type of business that Mr. Sterns conducted and something his arrangements with the South Pacific Wholesale Company, which you have listened to here.

What is the result of your investigation, as to how Mr. Sterns actually conducted his operations?

A. I think he conducted it in line with the agreement——

Mr. Reed: I object, your Honor.

The Court: Read the question.

(The question was read.)

The Court: What is your objection?

(Testimony of O. E. Cummins.)

Mr. Reed: I think the best evidence of how he conducted his business should not be ascertained from investigation conducted after the years before us. The proof of how the man conducted his business has been given [228] by witnesses that were acquainted with it at the time, who had personal knowledge of it.

The Court: The objection is sustained. The question obviously calls for a conclusion.

Q. (By Mr. Burrell): At the commencement of your investigation, did you request of Mr. Sterns his books of account respecting his business?

A. I did.

Q. Did he produce any books of account?

A. He did not.

Q. Did he advise you anything at that time in respect to any books of account?

A. He said he had no books. He did produce canceled checks, part of them.

The Court: Did you have the impression he produced all that he had of his books?

The Witness: I believed him when he said he didn't have any books, yes.

Q. (By Mr. Burrell): Did you therefore resolve to a reconstruction of his income on some other method than his books? A. I did.

Q. What was that method?

A. That covers a lot of territory. [229]

The Court: It is described generally as what kind of method, Mr. Cummins. You can explain later.

(Testimony of O. E. Cummins.)

The Witness: The bank deposit method with adjustments in the way of deductions and additions, based upon evidence found other than in the bank deposits.

Q. (By Mr. Burrell): Did you investigate into the bank accounts that Mr. and Mrs. Sterns carried during the years 1943 and 1944?

A. I did.

Q. Did you compute and analyze those accounts?

A. I did.

Mr. Burrell: I will ask the Clerk at this time to mark for identification next in order a series of documents which are clipped together.

The Clerk: Exhibit P for identification.

(The document above referred to was marked

Respondent's Exhibit P for identification.)

Q. (By Mr. Burrell): Mr. Cummins, I hand you Respondent's Exhibit P for identification, and ask you to explain what it is.

A. That is a summary that resulted from an analysis of bank accounts.

Q. You have examined Respondent's Exhibit P, have you, prior heretofore? A. Yes. [230]

Q. Is it an accurate portrayal or representation and summarization of your investigation and your computations in this case? A. It is.

Mr. Reed: I object, your Honor. I don't believe that there is evidence in the record supporting that document. I have only had opportunity to examine that document a very few minutes. It is quite a lengthy instrument.

(Testimony of O. E. Cummins.)

It is unquestionably replete with omissions and errors. It is merely a revenue agent's opinion of what he thinks took place, completely unsupported by acceptable evidence.

The Court: Do you intend to offer Exhibit P?

Mr. Burrell: I do, your Honor. I may comment to your Honor that Exhibit P was handed to Mr. Reed for inspection and study yesterday morning at the commencement of the trial, and has been open to him at all times since, if that is of any significance here.

Mr. Reed: Mr. Burrell, I asked——

The Court: I suggest, Mr. Burrell, that you withhold offering Exhibit P and establish a foundation for it.

Mr. Burrell: Yes, I will be glad to do that.

The Court: Not offer it at this time. I think it is too early for you to present the summary of the investigation. We had better find out what your proof is. [231]

Mr. Burrell: I intend to have Mr. Cummins testify further, your Honor.

The Court: At the present the objection is sustained.

Q. (By Mr. Burrell): Mr. Cummins, referring to Respondent's Exhibit P for identification, what is on page 1, the first page?

The Court: Are you now going to testify from this summary? Is that the way you are going to proceed with this?

Mr. Burrell: I am going to use it as a means of

(Testimony of O. E. Cummins.)

calling things to his attention, your Honor, and things to refer to.

The Court: You are relying primarily on bank deposits, aren't you?

Mr. Burrell: Yes, your Honor.

The Court: Where are your bank statements?

Mr. Burrell: We have stipulated in the stipulation of facts filed herein the total amount of the deposits is in sum stated therein.

As I stated, the various banks involved are under subpoena and holding themselves ready, and both Mr. Reed and I discussed this earlier, and we both agreed it was not necessary for them to come into court with such voluminous records.

The Court: It is stipulated in 1943 the gross bank deposits were \$211,214.68. In 1944 the gross bank deposits were \$76,088.19. So that the Petitioner agrees to [232] those figures.

Now, the Petitioner has not agreed to the other items that would constitute adjustments, to show what withdrawals there were or why the withdrawals were made.

The stipulation saves time in the trial of the case, but it doesn't take us very far, in view of the objections Petitioner has made so far.

What do you intend to show, Mr. Burrell, with respect to the bank deposits?

Mr. Burrell: Well, the total amount of the deposits, I don't feel anything further need be shown. As to the adjustments thereto, I have Mr. Cum-

(Testimony of O. E. Cummins.)

mins' testimony, with his original work papers and records to testify from.

The Court: About what?

Mr. Burrell: That he analyzed the bank deposits and withdrawals, and that as a result of his investigation found transfers in certain amounts and loans in certain amounts, redeposits in certain amounts, and that sort of thing.

The Court: What is the net result of his analysis?

Mr. Burrell: That we arrive at the additional income that goes into the statutory notice of deficiency, your Honor.

The Court: Of \$160,492.21?

Mr. Burrell: Yes. We will arrive precisely at [233] that figure.

The Court: Why can't we get to the point right away and have the witness testify about the steps he took to arrive at those net figures?

Q. (By Mr. Burrell): Commencing with the total amount of bank deposits in 1943, Mr. Cummins, explain for the record the adjustments that you made to that figure in arriving at the final net income, which is added to the Petitioner's income in the statutory notice of deficiency.

Mr. Reed: Objection, if your Honor please. He is resorting to the same kind of information which was previously objected to and my objection sustained. I don't believe that his opinion, as to what withdrawals were used for, without support other than his opinion, is proper evidence.

(Testimony of O. E. Cummins.)

The Court: The question of what weight the Court will give to the explanation is a matter with which you are concerned. The agent is going to be allowed to explain his report.

The Court will consider whether the investigation has produced any direct evidence, and whether the Respondent has sustained his burden of proof, after considering all of the agent's testimony. But we will have to hear the agent's testimony. You can object for the record as we go along, [234] Mr. Reed.

Mr. Reed: Yes.

The Court: You may afterwards want to offer some rebuttal evidence, if you have it. That objection is overruled. We will go ahead and answer the question.

The Witness: This stipulation agreeing to so many deposits covers some three or four different bank accounts. Would you want that segregation with respect to all bank deposits or each bank statement separately?

As an example, I have deposits in the Bank of America at Wilshire and La Brea for 1943 of \$149,905.63. My report analyzes those in a separate schedule.

And we have another bank account in 1943 in the name of Sterns Liquor Company, with a total deposit of \$13,000.00.

We have another bank account in the Bank of America, West Hollywood, with total deposits for 1943 of \$48,309.05.

(Testimony of O. E. Cummins.)

Now, I have a summary of those all together, or I can give them for each bank separately.

The Court: All of the bank accounts apparently show total deposits in 1943 of \$211,214.68. You have determined that the net income for 1943 is \$160,492.21.

Mr. Burrell: Yes.

The Court: The difference is \$51,722.47. Now, what makes up the difference of \$51,722.47? [235]

The Witness: It is made up of undeposited checks received from——

The Court: Are you sure you understand me now?

The Witness: I think I do.

The Court: \$51,722.47 you have eliminated from tax.

The Witness: Yes.

The Court: The result is that that amount is accounted for and doesn't represent taxable income?

The Witness: That is correct. I can give you those items.

The Court: You have arrived at a net figure of taxable income of \$160,000.00.

The Witness: Yes.

The Court: Without going into too much detail at this time, what is the subject matter of that fifty-one thousand?

The Witness: There was eliminated from that on account of bank transfers and redeposits and loans \$42,921.51. Then there was added to that undeposited checks——

(Testimony of O. E. Cummins.)

The Court: Well, you eliminate forty-two thousand.

The Witness: That is right. That leaves \$168,293.17. And we included in income undeposited checks received from South Pacific Wholesale as commissions, and so forth, \$30,599.95. Undeposited currency for purchasing [236] cashier checks and payments to South Pacific for merchandise \$88,801.70. We should get a total there of \$287,694.82. We allowed as refunds on deposits to customers \$29,564.70. And we allowed as a deduction payment to South Pacific for merchandise \$97,637.91.

If we go up below that twenty-nine thousand you get another total there, a total of \$156,130.12. And then deduct the \$97,637.91 and it brings you out with a net income of \$160,492.21. I think that is right.

The Court: What did you do for 1944?

The Witness: Less bank transfers and similar items \$235.64, and brings a total of \$75,853.27.

Then we add to that undeposited checks received from South Pacific Wholesale Company as commissions and so forth \$26,281.87. Undeposited currency for use in buying cashier's checks and similar items \$26,777.75, and taxpayers' deposits to the account of Mrs. H. P. Hanthorn—

Mr. Reed: Pardon me. Will you speak a little louder, please?

The Witness: \$2,538.00. Making a gross of \$131,450.89. We allowed a deduction for refunds to customers of \$10,140.00. This then gives a subtotal of

(Testimony of O. E. Cummins.)

\$121,310.89. Cashier's checks and checks to South Pacific for purchase of [237] liquor \$45,695.65. And that brings the net income to \$75,615.24.

The Court: Mr. Cummins, what can you produce to support these various additions to income, the figure you have used for undeposited checks, undeposited currency?

The Witness: We have photostats of the cashier's checks and so forth purchased, deposited to South Pacific's bank account.

The Court: Well, that is cashier's checks. What about undeposited checks?

The Witness: Those are South Pacific's checks that he didn't deposit in his personal bank account, paid to him as commissions. Most of it is his personal, supposed to be personal profits on this agreement they had.

The Court: In 1943 you add to bank deposits \$30,599.95, for undeposited checks. And you add \$88,801.71 for currency used to purchase cashier's checks and so forth.

The Witness: That is correct.

The Court: Do you have photostat copies of cashier's checks in the amount of \$88,801.70?

The Witness: I don't think I would have all of them.

The Court: We are looking now at your typewritten report, but what do you have here that represents direct proof of the purchase of those cashier's checks? Do you have them here in the courtroom, Mr. Burrell? [238]

(Testimony of O. E. Cummins.)

Mr. Burrell: I believe we have some of them. I am not certain about all of them. As to the item of thirty-thousand some odd hundred dollars of undeposited checks from the South Pacific Wholesale Company——

The Court: Are those from South Pacific Wholesale?

Mr. Burrell: Yes.

Q. (By Mr. Burrell): Isn't that right, Mr. Cummins? A. Yes.

Q. Where did you get that figure?

A. Out of the South Pacific Wholesale Company's books.

Q. Books here in the courtroom and one of the exhibits? A. Yes.

The Court: How do you get an explanation of the checks of South Pacific? You get a figure for checks of South Pacific, but where do you find out that those checks were not deposited in the bank account?

The Witness: From the endorsements on the checks.

The Court: Then you have had to look at the checks?

The Witness: Absolutely, I have looked at thousands of checks in this thing.

The Court: The endorsements on the checks, of course, have to be ascertained by going outside of the books of South Pacific?

The Witness: To the South Pacific's checks.

The Court: So in addition to looking at the

(Testimony of O. E. Cummins.)

South Pacific's books, you also looked at South Pacific's checks.

The Witness: That is correct.

The Court: All right. Those checks, are they here in the courtroom?

The Witness: They were summoned, I understand, subpoenaed. Weren't they, all the records?

The Court: Did you intend to rely simply on the agent's testimony, Mr. Burrell?

Mr. Burrell: Not entirely, your Honor. I thought we had sufficient of the books. We put a subpoena on the proprietor of South Pacific for all of the records. Apparently not all of his records have been produced.

I still believe that the book of original entry of South Pacific here in the courtroom, would not its cash register show all the checks issued?

Q. (By Mr. Burrell): Then, Mr. Cummins, do you not have in this schedule and records an analysis as to the checks, check by check, and the drawer of the check, every check deposited which goes into the total amount which has been stipulated to? A. I have.

The Court: Where is that schedule?

Mr. Burrell: In Respondent's P for identification.

The Court: Haven't you separated these items so [240] they can be offered one by one?

Mr. Burrell: You mean the original? We are referring now to deposits. Those would only be in the bank's records, your Honor.

(Testimony of O. E. Cummins.)

The Court: I am talking about this one item I am inquiring about, undeposited checks.

Q. (By Mr. Burrell): Do you have a schedule on that or detail on that, Mr. Cummins?

A. Yes. 1944, I have the schedule here for 1944; which item was it you wished?

Q. The thirty-thousand some odd hundred dollars of undeposited checks paid from South Pacific Wholesale Company to Mr. Sterns that you have added to the bank deposits—

The Court: Thirty thousand dollars is the figure for 1943. For 1944 the figure—these checks apparently are South Pacific's checks—is \$26,281.87.

The Witness: That, your Honor, consists of the following: On February 23, 1944—

The Court: May I ask you, do you have it there or not?

The Witness: The detail of it?

The Court: Yes.

The Witness: Yes, I do. That is what I was reading. [241]

The Court: Could you separate that piece of paper from your report?

The Witness: I don't know why I couldn't.

The Court: Do you have a similar sheet for 1943?

The Witness: Yes, I have.

Mr. Burrell: Just to point out, your Honor, there is a summarization in this schedule, Respondent's Exhibit P.

The Court: Speak up, for the record.

(Testimony of O. E. Cummins.)

Mr. Burrell: Yes. In Respondent's Exhibit P for identification, there is a schedule showing the detail on the undeposited checks from the South Pacific Wholesale Company for Mr. Sterns, for both of the years involved.

The Court: That gives me some idea about how you intend to proceed with Mr. Cummins' testimony. May I say to you now, Mr. Burrell, that it will no doubt eliminate a good many objections if you will arrange to have in court for examination by Petitioners' counsel the actual checks and books upon which you rely as proof of the existence of these amounts of money which you classify as income in each of these years.

If you are going to rely solely on the revenue agent's statement about his investigation and upon his summary report that he filed in his office as a result of the investigation, you will encounter the difficulty of not having direct evidence of any of the conclusions which the [242] agent drew from his examination.

Mr. Burrell: Your Honor, in some of these instances it is clear to me that that is the best we can do. I have issued and served a subpoena on the proprietor of South Pacific Wholesale Company, to bring in all his records relating to any transaction relating to Mr. Sterns.

The Court: He was here yesterday. You could have asked him yesterday to see the checks. The checks were here——

Mr. Burrell: I asked him if he had anything

(Testimony of O. E. Cummins.)

more, and he said no. Mr. Radke has been dealing, as he testified, with the South Pacific Wholesale Company for a period of years and gone through their books in great detail. Possibly he would know whether those checks are, what has happened to them. I can only rely on the proprietor's word that he doesn't have them.

Do you know?

Mr. Radke: No.

The Court: I will take a recess for a few minutes, as counsel wish to discuss another case.

(Short recess taken.)

Mr. Burrell: You Honor, might I have one minute, please?

The Court: Yes.

Mr. Burrell: Thank you, your Honor, for the time. I believe when we recessed, your Honor, we were discussing the particular matter of the year of 1943 of the sum thirty thousand five hundred some dollars of undeposited checks from South Pacific Wholesale Company, which Mr. Cummins at his investigation computed, and the sum of approximately \$26,000.00 in the year of '44. Is that correct?

First of all, the record shows we have subpoenaed duces tecum the proprietor of South Pacific Wholesale Company to bring in all records, and he has not produced the records which would evidence the payment to Mr. Sterns and his endorsement; the fact they are not deposited in these bank accounts.

Q. (By Mr. Burrell): Did you ever at any time

(Testimony of O. E. Cummins.)

ever see the original checks involved in this adjustment? A. Yes, I did.

Mr. Reed: Objection.

The Court: Overruled.

Q. (By Mr. Burrell): Did you cause any of those checks to be photostated? A. I did.

Q. Are any of those photostats here in court?

A. Yes.

Mr. Burrell: At this time I will hand to the Clerk certain photostatic copies of checks, the first group for the year 1943, to be marked for identification.

The Clerk: Q for identification. [244]

(The documents above referred to were marked Respondent's Exhibit Q for identification.)

Q. (By Mr. Burrell): Mr. Cummins, handing you this exhibit marked for identification as Respondent's Exhibit Q, I will ask you if these are photostats of the original checks of South Pacific Wholesale Company to Cy Sterns, undeposited checks for the year 1943? A. Yes.

Mr. Burrell: I will offer these in evidence at this time.

The Court: Upon what do you base your conclusion they are undeposited?

The Witness: Because they do not appear in the taxpayer's bank account as deposits.

The Court: Most of these are endorsed by Mr. Sterns?

The Witness: That is correct.

(Testimony of O. E. Cummins.)

The Court: Could he have deposited cash in his account?

The Witness: He deposited thousands of dollars in his account.

The Court: Could he have cashed these checks and deposited the cash?

The Witness: I presume he could.

The Court: Could he have cashed a check for [245] \$10,000.00 and deposited \$5,000.00 in cash?

The Witness: He could. But the record doesn't indicate that.

The Court: It is a circumstantial item of evidence, is that right?

The Witness: Yes. You mean that it might have been cashed?

The Court: That none of these might have been deposited.

The Witness: They were not deposited as checks.

The Court: They were not deposited as checks.

The Witness: That is right.

The Court: That you have ascertained, but you can't ascertain whether any cash from these checks might have been deposited as cash?

The Witness: No. He may have cashed ten thousand and carried it around for a month and deposited the cash; I can't tell.

The Court: So to that extent these checks, Exhibit Q, would be offered as evidence that the checks themselves were not deposited because they don't show the stamp of a bank?

Mr. Burrell: Yes, your Honor.

(Testimony of O. E. Cummins.)

The Court: Which would appear if they had been deposited. [246]

Mr. Burrell: Yes, your Honor. They are offered for that limited purpose. That is satisfactory.

The Court: Mr. Reed, have you any objection to that?

Mr. Reed: I would like to see them.

The Court: Put a paper clip on those, please.

The Clerk: Yes.

Mr. Reed: Your Honor, some of these checks do have a series of stamps on them, indicating that they have gone through certain bank accounts. I am sure it is not proof that these were not deposited in the Petitioner's bank account.

The Court: Mr. Cummins, will you look at Exhibit Q again? Do those checks show a stamp of a bank which would show clearance through a bank?

The Witness: Yes, this check here shows it is cashed; the bank stamp right on it, "Cash."

Mr. Reed: Where is that?

The Witness: Right there (indicating).

The Court: Perhaps you should explain what marking on those checks leads you to conclude they were cashed and not deposited in Mr. Stern's bank account.

The Witness: This one is marked "Cashed" by the bank. This one is endorsed by some other party than Mr. Sterns, so it couldn't have been put in the bank deposits.

The Court: Who was it endorsed by? [247]

The Witness: J. J. Spanldy, S-p-a-n-l-d-y.

(Testimony of O. E. Cummins.)

This one here was cashed by Arene Perneti.

The Court: Who is he?

The Witness: The manager of South Pacific Wholesale Company.

This one here was deposited to South Pacific Wholesale Company.

This check was cashed at the Bank of America. The indication at the end of the stamp with 111, under the triangular stamp.

Mr. Reed: Pardon me. How do you determine that was cashed?

The Witness: By this number 111. The Bank of America has a schedule in which they stamp their checks 111 and it is a cashed check.

The Court: Go ahead.

The Witness: This check was deposited to South Pacific, also (indicating).

The Court: All right. Those are received in evidence as Exhibit Q.

(The documents heretofore marked Respondent's Exhibit Q were received in evidence.)

Q. (By Mr. Burrell): Mr. Cummins, did you make a detailed analysis and keep a written record of all the deposits of Mr. and Mrs. [248] Sterns for the two years here involved, and which deposits total the two amounts for the two years involved they have stipulated to? A. Yes.

Q. You have a detailed schedule which will add up to the penny the full amount?

A. That is right.

(Testimony of O. E. Cummins.)

Q. Do you have that here at the witness stand with you? A. I do.

Q. Will you hand it to me, please?

Mr. Reed: Objection, your Honor.

The Court: I suggest you wait just a minute on that objection, until we find out what Mr. Burrell is going to do.

Q. (By Mr. Burrell): Do you have such a schedule in front of you at the witness stand, Mr. Cummins? A. Yes.

Q. Do any of the checks in Respondent's Exhibit Q appear in your schedule on the deposits?

A. No, they do not.

Q. Do any of the checks which comprise the sum of thirty-five thousand five hundred some dollars as undeposited currency from South Pacific Wholesale Company to Mr. Sterns for the year 1943 appear on your records? [249]

The Court: Undeposited currency?

Mr. Burrell: He has designated it that way. I suppose it should be called undeposited checks.

The Court: What do you mean, currency or checks?

Mr. Burrell: I think that is my error. It should be undeposited checks.

Mr. Reed: Objection. I made effort to put Mr. Radke on the stand to testify from this report, a copy of which I had furnished Respondent.

The Court: Let's stick to your objection to this, please. What is your objection to this, Mr. Reed?

Mr. Reed: I believe it calls for a conclusion of

(Testimony of O. E. Cummins.)

the witness. It is not the best evidence. This was objected to previously because the books were the best evidence.

The Court: We are finished with that item, if you please. Your objection to this is—you have stated what your objection is?

Mr. Reed: That is not the best evidence.

Mr. Burrell: Your Honor, I haven't put in a document. This gentleman is testifying from his memory, as to the results of his investigation. He can cross examine.

Mr. Reed: He is testifying as to what redeposits and deposits were.

Mr. Burrell: Not at this moment he isn't.

Mr. Reed: Please, what was the question? [250]

The Court: How could you tell, Mr. Cummins, whether any of these checks, Exhibit Q, which I think is what we are referring to, were deposited in Mrs. Sterns' or Mr. Sterns' bank account during 1943.

The Witness: Because I went to the banks, and I secured copies of all deposit tickets with the details that made up each individual deposit each day, that there was a deposit.

On those deposit tickets is listed what we call an A. B. A. number, which indicates the bank on which that check is drawn. I took these checks——

The Court: Who puts those numbers on?

The Witness: Mr. Sterns or whoever makes the deposit in the Sterns account.

The Court: Whoever makes the deposit?

(Testimony of O. E. Cummins.)

The Witness: That is right.

The Court: That is the little clearing house number?

The Witness: That is correct.

The Court: On Exhibit Q, on a check for \$10,000.00, December 3, 1943, is a small number at the left, 90-984. That is the number of what bank?

The Witness: The Hollywood State Bank.

The Court: So in looking at the deposit slips, you mean to say you didn't find an identification for a deposit that would be 90-984, \$10,000.00? [251]

The Witness: That is correct. It is not in the bank account. Neither as \$10,000.00 or as identified by the A. B. A. number.

The Court: All right. Now, that is this witness' sworn testimony. He gives that from making an examination of the records. You may of course cross examine him. The objection is overruled.

Mr. Burrell: At this time I will hand to the Clerk for identification the Respondent's next in order, photostats of checks.

The Clerk: Exhibit R for identification.

(The documents above referred to were marked Respondent's Exhibit R for identification.)

Q. (By Mr. Burrell): I will hand this group of checks, Respondent's Exhibit R for identification, to you, Mr. Cummins, and ask you what they are.

A. They are all South Pacific Wholesale Company's checks.

The Court: For what year?

(Testimony of O. E. Cummins.)

The Witness: 1943.

Q. (By Mr. Burrell): Are you certain it is 1943, Mr. Cummins?

A. Yes. There are some checks there for 1943.

The Court: There are some '44 there. I thought [252] you had segregated those and put all the '43 checks together and the '44 checks.

Mr. Burrell: I thought we had too, your Honor. I am sorry. Your Honor, I am sorry, I have made an error in picking up the wrong group of checks from my desk. I do not wish to have marked the same group I handed to the Clerk a moment ago for identification. May that be stricken out, your Honor?

The Court: You can strike that stamp.

The Clerk: Stricken.

Mr. Burrell: I will hand to the Clerk at this time a group of photostatic checks and ask it be marked for identification.

The Clerk: I will mark this Exhibit R for identification, in lieu of the other group.

Q. (By Mr. Burrell): I will hand you this group of checks and ask you what they are.

A. They are also South Pacific Wholesale Company's checks made payable to Cy Sterns for the year 1944.

Q. Have these checks been deposited in the accounts of Mr. Sterns, as shown by your investigation? A. Yes, they are.

Mr. Burrell: I will offer this exhibit in evidence, your Honor. [253]

The Court: I suppose if they weren't deposited,

(Testimony of O. E. Cummins.)

the answer ought to be no, they weren't deposited, instead of yes, they are. What do you mean to say?

The Witness: 'They were not deposited.

The Court: All right. Let's just go through this carefully, as we did with the rest. How are those checks endorsed?

The Witness: There is one for \$8,522.70, endorsed, payable to Cy Sterns, endorsed Cy Sterns, and went to South Pacific Wholesale Company.

Check dated February 2, 1944, for \$4,800.00, endorsed by Cy Sterns at the Bank of America, at the exchange cashier's check window. It was not deposited.

February 3, 1944, payable to Cy Sterns for \$585.50, endorsed Cy Sterns. This was also used at the cashier's exchange window.

The Court: What bank?

The Witness: Bank of America.

February 22, 1944, check for \$1,015.50, endorsed Cy Sterns, cashed at the Bank of America.

3-17-44, check to Cy Sterns for \$33.60, endorsed Cy Sterns. It was cashed at the Bank of America and has the notation of reimbursement "for telephone."

A check for \$1,500.00, dated March 17, 1944, endorsed by Cy Sterns, cashed at the Bank of America. [254]

3-18-44, check to Cy Sterns in the amount of \$2,702.27, and endorsed by Cy Sterns, and the bank stamp is so low I can't tell what department it was used in or if it was cashed. But it is not in the deposits.

(Testimony of O. E. Cummins.)

March 23, 1944, check to Cy Sterns for \$849.30 and cashed at the Hollywood State Bank and endorsed by Cy Sterns.

July 28, 1944, a check payable to Cy Sterns in the amount of \$1,000.00 and endorsed by Cy Sterns and A. Perneti, and deposited to Perneti's account in the Hollywood State Bank.

Mr. Burrell: I offer those in evidence, your Honor.

Mr. Reed: Objection, your Honor. The best evidence of what those checks were transferred for is not being given. Mr. Cummins is stating his conclusions as to the purpose for which those checks were used.

The Court: No, he is not. He is stating what the checks themselves show.

Mr. Reed: Very well.

The Court: He has been reading from the checks. The objection is overruled. They will be received as Exhibit R.

(The documents heretofore marked Respondent's Exhibit R were received in evidence.)

Q. (By Mr. Burrell): Mr. Cummins, you have testified earlier that, I [255] believe, the next item of addition to income that you made in your computations was an item of some eighty-eight thousand dollars of other currency used, and not indicated or shown in the bank deposits, is that correct?

A. That is correct.

Q. Explain in your testimony, as a result of your

(Testimony of O. E. Cummins.)

investigation what comprises that sum, what it is made up of?

A. Well, the first item on the list is a cashier's check No. 7866, purchased by Mr. Sterns with currency, in the amount of \$27,112.00, payable to South Pacific Wholesale Company.

The Court: What is the date of that?

The Witness: 10-19-43.

The Court: \$27,112.00 even?

The Witness: That is right.

The Court: Let's take that item for a minute.

Your investigation is that on October 19, 1943, Mr. Sterns bought a cashier's check for \$27,112.00?

The Witness: That is correct.

The Court: And you are interested at this point where he got the money, are you?

The Witness: I only know he used cash to purchase it.

The Court: You know he used cash to purchase it. You treat this as an item of cash, which must be included in [256] gross income?

The Witness: Not until the cashier's check is purchased.

The Court: That is correct.

The Witness: That is correct, yes.

The Court: Cashier's check is purchased with cash.

The Witness: That is correct.

The Court: Under the group of checks, Exhibit Q, there were some checks cashed of South Pacific,

(Testimony of O. E. Cummins.)

that were cashed. Those had been included in gross income?

The Witness: That is correct.

The Court: How can you be sure that you wouldn't be making a duplication?

The Witness: I am not sure.

The Court: You are not sure?

The Witness: Whenever a check is converted into cash we cannot follow it. There is no way of following it. I am not saying there isn't a duplication.

The Court: All you can say is you found in your investigation that the cashier's checks were purchased?

The Witness: That is right. And cash was used to purchase them.

The Court: How did you locate that information?

The Witness: From the bank's records. I have a copy of the application for cashier's check, and that application [257] shows the funds used, the bank shows that on the application.

The Court: It shows that cash was used?

The Witness: Yes.

The Court: Are those in the courtroom here?

The Witness: Yes.

The Court: Then you made up a schedule, I suppose, you are reading from.

The Witness: Yes.

The Court: Of course, I don't want to take the time to have you read that into the record, but if that is the only thing you can do, I guess that is the only thing you can do.

(Testimony of O. E. Cummins.)

The Witness: I would like to indicate here that this \$27,112.00 is in the same transaction, used as a part of the purchase price of liquor, paid to South Pacific, because the check was payable to South Pacific. In other words, in effect, what took place, he took \$10,000.00 in cash and gave to South Pacific for payment of some liquors; instead of giving South Pacific \$10,000.00 he goes and buys the cashier's check and gives South Pacific the cashier's check.

The Court: How many of these items are there where cashier's checks were purchased, three or four?

The Witness: There were four in '43.

The Court: We are just concerned with 1943.

The Witness: That is right; three more. [258]

The Court: The total was \$88,801.70.

The Witness: No. This is included in that; two other items.

The Court: They are not cashier's checks?

The Witness: That is right. We have a telegraphic transfer of \$25,000.00 to Mrs. Sterns in San Francisco, in which cash was used.

The Court: Go ahead then with your testimony. You are going to describe the cashier's checks, I believe.

The Witness: On 11-13-43 there was a cashier's check purchased for \$31,315.86, cashier's check No. 8324, payable to South Pacific Wholesale Company. This cashier's check was paid for by the following method: Cy Sterns' check in the amount of

(Testimony of O. E. Cummins.)

\$13,835.86, drawn on his personal bank account, and currency in the amount of \$17,480.00; that makes it.

The Court: What is your next item?

The Witness: 11-16, a cashier's check in the amount of \$21,370.00, cashier's check No. 8271, payable to Cy Sterns.

Used in the purchase of that cashier's check, a check of Cy Sterns' in the amount of \$12,000.00, drawn on his personal bank, and \$9,370.00 in cash.

On 12-15, cashier's check for \$10,000.00, cashier's check No. 8570, payable to South Pacific Wholesale Company. This was purchased by Cy Sterns' check in the amount of [259] \$3,000.00 and \$7,000.00 in cash.

On 12—that is not one of the cashier's checks. Cancel that.

There is a total of \$2,839.70, which is made up of cash refunds that Mr. Sterns made to customers on deposits.

The Court: How do you know that?

The Witness: I know that for the reason that Mr. Sterns furnished me with receipts showing that these were returned. And I interviewed the people who he said he refunded it to, and I found the money had been refunded.

The Court: These are receipts of the payees of the cash, that were given to Mr. Sterns and he had kept them and he showed them to you, is that it?

The Witness: The receipts, that is right.

The Court: John Jones would give him a receipt for certain cash refunds?

(Testimony of O. E. Cummins.)

The Witness: Yes. He would go out and get a deposit from a liquor dealer and couldn't furnish the liquor. So then Mr. Sterns would return that money to this liquor dealer and take a receipt for it.

So he gave me a list of these receipts and those that I could verify from contacting the person to whom he returned it—allowed that—and picked up from income, because this cash had to come from some other source. It wasn't the same cash. [260]

The Court: That is your conclusion.

The Witness: That is my conclusion.

The Court: Did he give you any receipts for refunds where you weren't able to identify them?

The Witness: He did.

The Court: Where you weren't able to identify the person?

The Witness: He did.

The Court: How many receipts for refunds did he give you for 1943, if you can remember?

The Witness: I think there was about ten; may have been fifteen. But part of those were refunds by check, so I didn't have to contact the retailer.

The Court: Well, all right. Now, what is the next item?

Q. (By Mr. Burrell): Mr. Cummins, the items you have just read are cashier's checks going into the sum of eighty-eight thousand some odd dollars. Are there any other items of income in that sum of eighty-eight thousand which you have not read?

A. Yes, on 12—

(Testimony of O. E. Cummins.)

Q. Are there just a few of them?

A. Just one.

Q. Read it.

A. On 12-3-1943 there was a telegraphic transfer to [261] Mrs. Cy Sterns at San Francisco, in which \$25,000.00 cash was used as a transfer.

Q. Is that the same item Mr. Sterns testified to on his direct examination?

A. That is right.

Q. Now, you have read——

The Court: Where did he get that \$25,000.00?

The Witness: I arrived at the conclusion it was from sales he made.

The Court: Why do you arrive at that conclusion?

The Witness: Because I visited practically all the retailers and I have affidavits from these retailers, at least 85 per cent of them, and they all paid over ceiling payments.

Mr. Reed: I object to such testimony, your Honor. It is really the opinion of the witness. It really isn't the best evidence of what took place.

The Court: I think I will have to strike that testimony of yours. You apparently misunderstood the Court's question, and therefore it wasn't responsive to the question.

I didn't ask you what the source of that money was, in that sense. I had asked you before whether you could say definitely whether an item of money was drawn out of his bank account.

The Witness: Yes. [262]

(Testimony of O. E. Cummins.)

The Court: How would you know whether or not this \$25,000.00 that was sent by telegraph was or was not drawn out of his bank account?

The Witness: Because I had a transcript of all of his checks on the bank account. I have that here.

The Court: Well, the bank doesn't show the payees. The bank records don't show the payees of the check, do they?

The Witness: Cashier's?

The Court: Of checks, just checks. Is this a cashier's check, this \$25,000.00.

The Witness: That was a telegraphic transfer to San Francisco to Mrs. Sterns.

The Court: You simply take \$25,000.00 in cash and give it to the telegraph company.

The Witness: Yes, that is right.

The Court: Can you tell where that \$25,000.00 came from?

The Witness: No, I can't tell where it came from.

The Court: Can you be sure that that \$25,000.00 isn't duplicated in these uncashed checks from South Pacific, that come to a total of \$30,599.00?

The Witness: Except by dates. I would have to take the dates there and match them up. I don't believe they would total the twenty-five that way. I have no way of telling. [263]

The Court: All right. Go ahead now. Does that take care of Exhibit R?

Mr. Burrell: Of R, I believe it does.

(Testimony of O. E. Cummins.)

The Court: Or are these checks you wanted, \$88,801.70, explained?

Mr. Burrell: Yes. It takes care of that item.

The Court: Have you finished?

Mr. Burrell: Yes.

The Court: Those relates to 1943.

Mr. Reed: Do you have a copy for us to look at?

The Court: Ordinarily you don't furnish that. We have a fraud issue here, and this is a revenue agent's report. Until this is offered in evidence, I don't suppose it is customary for Respondent's counsel to hand over a copy of the agent's report. I have never seen that done.

Mr. Burrell: The schedules which Mr. Cummins has in front of him at this moment and testifying from are the same as Respondent's Exhibit P for identification, and handed to Mr. Reed yesterday morning. He has been furnished all the time he wished on them.

Mr. Reed: Mr. Burrell, that was handed to me yesterday morning when I was very busy. I asked if you had a copy I could take home, and you said you only had the one copy. I had never seen it before.

Mr. Burrell: May I have this copy? [264]

The Court: Yes.

Q. (By Mr. Burrell): I believe you have now given your testimony as to your investigation and computations of all the items of income for the year '43.

(Testimony of O. E. Cummins.)

The Court: You are now looking, Mr. Reed——

The Witness: Except the deductions.

The Court: ——at a copy of the revenue agent's report for 1943.

Mr. Burrell: Schedule 1.

The Court: You have been furnished that?

Mr. Reed: Yes.

The Court: Now, what page have you been reading from in that report?

The Witness: They are not numbered.

The Court: What is the caption over what you have been reading?

The Witness: Schedule 1.

The Court: The witness has been reading from Schedule 1.

Q. (By Mr. Burrell): Turning your attention now to the year 1944 in Schedule 1 of Respondent's Exhibit P for identification, just for review, what is the total amount of bank deposits shown? [265]

A. \$76,088.91.

Q. What adjustments have you made to that figure in income? What additions have you made to that figure of income?

A. Just the additions?

Q. Yes. What additions of income have you made to that figure?

The Court: You added checks in the amount of \$26,281.87, to get you started again. Were those checks to South Pacific?

Mr. Burrell: They are Respondent's Exhibit R, your Honor, previously discussed.

(Testimony of O. E. Cummins.)

Q. (By Mr. Burrell): Are there any other additions of income in 1944?

A. Undeposited currency.

Q. Explain that item. Does that appear in one of the schedules you are now referring to?

A. Yes, it does.

Q. Name the schedule for Mr. Reed.

A. Schedule No. 7. On February 3, 1944, there was purchased by Mr. Sterns a draft for \$20,000.00, payable to some Cuban company. It is an exhibit here, the draft to Cuba. And Mr. Sterns used his personal check of \$396.75 and currency in the amount of \$14,217.75 for that.

On February 23, 1944, Mr. Sterns deposited into an [266] escrow, Escrow No. 1486, Citizens National Bank, \$12,560.00 in currency.

Q. Is that the total of it, Mr. Cummins?

A. That is the total.

Q. We have now discussed all the items of income for both the years, have we? A. Yes.

Q. Now, let's turn our attention to offsets against against incomes for the year 1943. What credits did you give to Mr. Sterns against the income for that year?

A. I am looking at Schedule 8.

Q. The year 1943, what is the total amount of the items? A. \$29,564.70.

Q. What is that item? Describe it.

A. That item is cash refunds to customers in the amount of \$2,839.70, and total refunds by way of

(Testimony of O. E. Cummins.)

Cy Sterns' personal checks, \$29,564.70. The details are here, if you want them read.

Q. Are there further adjustments to income in the year '43, by reason of your investigation and analysis of transfers, redeposits, loans, so on?

A. Income was reduced on account of cost of merchandise, that is, payments for merchandise.

Q. I haven't come to that yet. Can you answer my [267] question, first? Have you also reduced the total amount of bank deposits, as the result of an analysis for transfers, redeposits and loans, and so forth?

A. I have.

Q. What amount? A. \$42,921.50.

Q. Is there a schedule to this exhibit showing that in detail? A. Yes, Schedule 3.

Q. It shows every one of those items in detail, does it? A. Yes.

The Court: Again, what is this for?

The Witness: Transfers, loans and other known item deposits in his bank account.

The Court: Known income?

The Witness: Deposits.

The Court: Deposits?

The Witness: Yes.

Q. (By Mr. Burrell): Have you made any allowance in your investigation and analysis for cost of goods purchased by Mr. Sterns?

A. Yes.

Q. In what amount for the year 1943?

A. \$97,637.91.

(Testimony of O. E. Cummins.)

Q. Do these schedules have a detailed analysis of that? [268]

A. They do; Schedule No. 7.

The Court: Now, I ask here whether the cost of merchandise sold agrees with Petitioner's cost?

The Witness: No.

Mr. Burrell: I doubt whether it does. No, I am sure it doesn't.

Mr. Reed: Your Honor, the books are here. They indicate the purchases in 1943 by South Pacific, on behalf of Mr. Sterns, for \$183,219—pardon me. That is the sales. I am sorry.

The Court: This is cost of sales, which would be an offset against receipts from sales?

Mr. Reed: The total purchases less the inventory at the end of the year——

The Court: Let me interrupt you again, now, if you will, please. You have in Exhibit 11, I believe, prepared cost of goods sold?

Mr. Reed: Yes.

The Court: And Respondent's counsel had no objection to that, I believe. Isn't that right?

Mr. Burrell: I had no objection to the testimony that Mr. Radke gave at that time.

The Court: Let's cut through it, gentlemen. You know what the Court is getting at.

The Petitioner has a figure of cost of goods sold. [268-A] Your agent has computed a figure of cost of goods sold.

Now, the simple question is, how far apart are you?

(Testimony of O. E. Cummins.)

Mr. Reed: Approximately \$60,000.00 for the year 1943.

The Court: Where do you stand, Mr. Reed? Is your figure of cost of goods sold higher than the agent's figure?

Mr. Reed: Yes, your Honor.

The Court: Now, where did you get your figures on cost of goods sold, Mr. Cummins?

The Witness: I got mine from Mr. Sterns' bank accounts and cashier's checks delivered to South Pacific, and South Pacific paid for all the liquor themselves. Sterns didn't pay for the liquor, except through the accounting that South Pacific made with respect to income due to Sterns.

The Court: Why wouldn't South Pacific records of liquor sold to Mr. Sterns be your first point of inquiry? It would invoice Mr. Sterns for liquor——

The Witness: No.

The Court: Wouldn't it?

The Witness: It invoices South Pacific, and South Pacific paid for it.

The Court: Do we understand? Are we talking about the same thing.

The Witness: Yes, your Honor.

The Court: South Pacific, as I understand it, [269] handled liquor for Mr. Sterns.

The Witness: It was all invoiced to South Pacific and South Pacific issued their checks for it. Mr. Sterns didn't pay it.

The Court: We are talking about entirely different things.

(Testimony of O. E. Cummins.)

The Witness: No, same liquor.

Mr. Burrell: I believe the answer is yes to your Honor.

The Court: The answer to my question is yes?

Mr. Burrell: We are talking about different things when we discuss his figure for cost of goods sold and our figure for cost of goods sold; we are talking about different things. Is there any further clarification needed?

The Court: No. That answers my question. This figure of the agent for cost of goods sold is different than in the figure in Exhibit 11.

Q. (By Mr. Burrell): Make a brief explanation how you arrived at the figure of \$97,000.00 for cost of goods sold, for which you gave Mr. Sterns a credit against income in 1943.

A. I gave him credit for all the moneys he turned over to South Pacific in settlement of liabilities for liquors or any other transactions he might have had with South Pacific.

Q. Did your investigation—— [270]

The Court: That is a conclusion. You say you gave him credit for all the moneys he paid over to South Pacific. Are you absolutely sure that the figure you have represents all that Mr. Sterns paid over to South Pacific?

The Witness: According to South Pacific's books and according to Sterns' bank account. That is the only way I have——

The Court: We will straighten this out in a re-

(Testimony of O. E. Cummins.)

cess. There is something off there. Go ahead. What is your next question?

Mr. Burrell: May I refer to Exhibit P for a moment?

The Court: Offsets against income. Payments to South Pacific could be one offset. What is the next offset?

Q. (By Mr. Burrell): Did you give him any offsetting credit for refunds which you could identify?

A. Yes.

Q. How much is that amount in 1943?

A. \$29,564.70.

Q. Now, directing your attention to the year 1944, what credits or offsets against income did you make in that year? A. For refunds?

Q. Give that figure first.

A. \$10,140.00. [271]

Q. Did you make any credit or offset for cost of goods purchased in that year? A. Yes.

Q. How much? A. \$45,695.65.

Q. By taking the bank deposits, the gross bank deposits, adjusting it for the transfers, redeposits, loans, and et cetera, which you have testified to, by further reducing that figure by the amount of refunds and the cost of goods purchased, which you have testified to, then by adding to it the undeposited checks from South Pacific Wholesale Company and the other currency which you used—did not go through his bank deposits—you have arrived at a final figure of net taxable income for each of the two years, is that correct?

(Testimony of O. E. Cummins.)

A. That is true.

Q. Mr. Cummins, does Respondent's Exhibit P for identification correctly and accurately set forth your testimony as to the results of your investigation? A. It does.

Mr. Burrell: I will offer it in evidence at this time, your Honor.

Mr. Reed: Objection, your Honor.

The Court: Has it been marked?

Mr. Burrell: It has been marked, your Honor.

The Court: It is P for identification. For the [272] present the objection is sustained.

Now, P relates to the year 1943, is that right?

Mr. Burrell: No; both years.

The Court: What else have you?

Mr. Burrell: Would it be convenient for your Honor to take a short recess?

The Court: I want to know approximately how much more you have .

Mr. Burrell: Very little.

The Court: Then you will be ready for cross examination?

Mr. Burrell: Yes.

The Court: All right.

(Short recess taken.)

Q. (By Mr. Burrell): Mr. Cummins, you have testified that in the year 1943 you allowed as an offset against income the sum of approximately \$97,000.00, is that correct? A. That is correct.

Q. Are there very many items entering into that sum? A. About eight.

(Testimony of O. E. Cummins.)

Mr. Burrell: I would like to have them identified and read into the record, your Honor.

The Witness: On 10-19-1943 Mr. Sterns bought a cashier's check, No. 7866, in the amount of \$27,-112.00, which [273] was given South Pacific and deposited in their bank account, which was allowed as costs, purchase of liquor or whatever you called it in settlement of their agreement.

On 11-13-1943 he also purchased a cashier's check in the amount of \$31,315.86, cashier's check No. 8324.

The Court: You don't have to read the number at the present time. It takes too much time.

The Witness: This was allowed as a deduction, cost of merchandise.

The Court: And went to South Pacific?

The Witness: Yes. On 12-1-43 Cy Sterns' check in the amount of \$6,182.55, went to South Pacific. That was allowed as a cost of merchandise.

On 12-1-43 a check for \$9,000.00 by Cy Sterns to South Pacific Wholesale Company, allowed as cost of merchandise.

On 12-2, taxpayer's check for \$3,517.50, allowed as cost of merchandise.

12-15, cashier's check for \$10,000.00, payable to South Pacific Wholesale Company, allowed as cost of merchandise.

On 12-7-1943 taxpayer's check for \$510.00 to South Pacific Wholesale Company, allowed as cost of merchandise.

On 12-30, cashier's—taxpayer's check for \$10,-

(Testimony of O. E. Cummins.)

000.00, allowed as cost of merchandise. Making a total [274] of \$97,637.91.

Q. (By Mr. Burrell): And for the year 1944?

A. 1944, on January 13th taxpayer's check in the amount of \$6,000.00 to South Pacific Wholesale Company, allowed.

On January 25th taxpayer's check for \$14,000.00 to South Pacific Wholesale, allowed as a cost of merchandise.

On February 3, 1944, a draft payable in Cuba to some Cuban corporation for \$20,000.00, as a deposit on liquors, allowed as cost of merchandise.

Q. Mr. Cummins, is that the same item with respect to which Mr. Sterns testified that he had a loss of \$20,000.00 in some money he sent to Cuba?

A. Yes, that is the same item.

Q. Thank you. Go ahead.

A. On 2-17, taxpayer's check for \$1,265.20 to South Pacific Wholesale, allowed.

The Court: How much is that?

The Witness: \$1,265.20. On 2-18, \$1,292.45, taxpayer's check, allowed.

On August 5th, taxpayer's check for \$3,138.00 to South Pacific Wholesale, allowed as cost of merchandise, and that makes a total of \$45,695.65.

Mr. Burrell: May I ask your Honor whether any of the schedules in Respondent's Exhibit P marked for identification [275] will be helpful to your Honor in her record, if they are introduced solely as schedules and memorial of his testimony. He has

(Testimony of O. E. Cummins.)

testified to may of the figures and all the totals in this exhibit. It really has served my purpose.

The Court: I will let you know after you get finished.

Mr. Burrell: I am finished with this testimony, as to these schedules. That is all of the direct examination of Mr. Cummins.

The Court: Does Respondent rest?

Mr. Burrell: Respondent rests.

Cross Examination

Q. (By Mr. Reed): Mr. Cummins, in your cost of goods sold I believe you allow Mr. Sterns a \$20,000.00 item that represented a telegram that went to Cuba.

The Court: Mr. Reed, may I interrupt, please? Let's not take up time with the de minimis or minor items. If that were considered as either a loss or a cost it would be an offset to income.

Now, why don't you direct your questions to the substantial or main things here and take up the little things at the end?

Mr. Reed: Your Honor please, the schedule we put in evidence in Exhibit 11 showed total purchases for 1943 of [276] \$222,259.77 on page 15. That is still not including the \$20,000.00 item Mr. Cummins gave us or treated as a purchase. So that leaves——

The Court: As I say, that is a little item. If we were getting down to auditing this thing down to

(Testimony of O. E. Cummins.)

the penny, we would have to consider it. You pointed out that. Now, go on to something else.

Q. (By Mr. Reed): Mr. Cummins, I believe you stated you commenced the investigation of Mr. Sterns early in '45, in late '45 or early '46.

A. To the best of my recollection.

Q. When did you first learn the Petitioner was without assets?

A. I haven't learned that yet.

Mr. Reed: Please mark this Petitioners' exhibit.

The Clerk: Exhibit 17 for identification.

(The document above referred to was marked Petitioners' Exhibit No. 17 for identification.)

Q. (By Mr. Reed): I hand you Petitioners' Exhibit 17 for identification and ask you if you did not receive the original of that.

A. The first time I saw this was in your office about three weeks ago.

Mr. Burrell: What is your answer then to his question, [277] Mr. Cummins? Would you prefer to have the reporter read it back?

The Court: Go ahead.

Mr. Burrell: He asked you whether or not you received the original of what he handed you.

The Witness: I never did receive the original.

Q. (By Mr. Reed): I don't recall you being in my office three weeks ago.

A. I said approximately three weeks ago. It was during conferences—it was in Mr. Burrell's office.

(Testimony of O. E. Cummins.)

Q. Where is my office? Let's get this straight now.

A. Mr. Burrell's office, and you were present; so was Mr. Radke.

Q. I believe you stated at one time that you had a conference with Mr. Sullivan before you began the fraud investigation of Mr. Sterns. You first investigated Mr. Sterns and set up a deficiency of \$170,000.00. You had no conference with Mr. Sullivan, assistant revenue agent in charge?

The Witness: Read the question, please.

Q. (By Mr. Reed): Did you have a conference——

A. No, I did not.

The Court: What is the materiality of this, please? [278] Are you laying a foundation for something?

Mr. Reed: I am trying to prove through this witness he had knowledge this Petitioner was without assets in the year 1944. That he closed the year heavily in debt as a result of his business operations; just had no net worth. It was a deficit.

The Court: He testified he began the investigation in late '45 or 1946.

Mr. Reed: That is true.

The Court: Read the question, please.

(The question was read.)

The Court: Did you or didn't you?

The Witness: No, I did not.

Q. (By Mr. Reed): Mr. Cummins, did you not state——

The Court: To whom?

(Testimony of O. E. Cummins.)

Q. (By Mr. Reed): Do you recall a conference when Mr. Burrell and Mr. Pierce were present?

A. I recall two or three conferences.

Q. And I was also present?

A. Yes, you were present.

Q. Did you not state at that conference that the Government would never get a nickel out of this taxpayer? A. I did not. [279]

Q. Isn't it true, Mr. Cummins, you have adopted what you call this bank deposit theory, and you knew very well the net worth theory would show a deficit in earnings for 1943 and '44? A. No.

Q. Mr. Cummins, you had Oscar Ross' books?

A. Yes.

Q. You prepared a transcript of those books?

A. No, sir.

Q. At this same conference I refer to, did you not make the statement that, when I stated to you Mr. Sterns owed Oscar Ross \$32,000.00 on December 31, 1944, did you not state substantially this: "The books showed he owed \$32,000.00, but I have gone over those books and I will show you where that was over ceiling profits, and that is the way they set it up"?

A. No, sir, I didn't state that.

Q. You did have Mr. Ross' books?

A. I did; examined Mr. Ross' books.

The Court: Your questions, of course, seem to go outside the direct examination.

Mr. Reed: Yes, your Honor, but candidly I am trying to impeach the witness for this reason: We

(Testimony of O. E. Cummins.)

subpoenaed Oscar Ross and his books. We had trouble locating him. He dodged us and he came in here as an unfriendly witness to [280] Mr. Sterns. I attended a conference in the Bureau office——

The Court: If you are going to take the stand later or ask to take the stand later and testify under oath, that is one matter. But I simply point out that——

Mr. Reed: We will pass it then.

The Court: ——this cross examination has nothing to do with the direct examination of this witness.

The Witness: I could very well clarify this matter if it is desired. I know what I stated. What I did on Mr. Ross' books, I didn't make a transcript of the books.

Q. (By Mr. Reed): Mr. Cummins, you testified about this undeposited currency. Could that not have been withdrawn previously from the bank.

A. I didn't quite understand.

Q. The undeposited currency that you testified to, could that not have been withdrawn previously from the bank?

A. I would have no way of telling that. I will state this, that I couldn't identify any cash checks of similar amounts or at similar times in these amounts.

Q. Then in order for your theory—in arriving at the Petitioner's net income, then it is by your own admission that it is likely to be inaccurate. your theory?

(Testimony of O. E. Cummins.)

A. I don't believe there is any report that is accurate. I believe we all make errors; we make mistakes. [281] I can't claim that is full proof; I did the best I could.

Q. In 1943, show me in that exhibit where you allowed this Petitioner any expenses for office, lights, telephone, salesmen, et cetera.

A. I didn't allow any.

Mr. Reed: Your Honor please, I just don't know how to conduct this case on one point here. We have canceled checks exceeding what Mr. Cummins has allowed. We also have receipts for these refunds in excess of what he has allowed. I don't like to take the time to take each check and——

The Court: If you have rebuttal evidence you should introduce it, no matter how much time it takes. That is part of your duty.

Q. (By Mr. Reed): Didn't Mr. Sterns appear before you at your office? A. No, sir.

Q. I believe you testified that Mr. Sterns was uncooperative——

The Court: I don't recall that.

The Witness: I don't think I did. If I did, I didn't intend to.

Q. (By Mr. Reed): That he didn't turn over his records to you.

A. I stated I believe he turned over his canceled checks and said he had no records other than canceled checks [282] and a few receipts. That is all I ever saw of Mr. Sterns' until this black book appeared.

(Testimony of O. E. Cummins.)

The Court: You mean to say that an exhibit we have here, a black book, which is Exhibit G, wasn't shown to you?

The Witness: No.

The Court: When you asked for some records?

The Witness: No.

Mr. Reed: May I see that exhibit?

The Court: That is P for identification.

Q. (By Mr. Reed): Mr. Cummins, do I understand correctly this total sum, treated as income, this \$30,000.00——

Mr. Burrell: It is the total amount of a group of checks on Schedule 6.

The Witness: Yes, that has been added to income.

Q. (By Mr. Reed): May I ask you how you could call refunds, loans, exchange, commissions income?

A. Mr. Sterns received them. That is the only way I know of.

Q. Are loans income?

A. The first check made payable to H. P. Hanthorn, he was using the name Hanthorn in various transactions.

Q. Clarify that. He was using the name Hanthorn?

A. Yes. I come on to this refund and traced it down [283] and found out this check was endorsed by Perneti. Perneti in a sworn statement said he cashed the check and gave the cash to Cy Sterns.

(Testimony of O. E. Cummins.)

Q. Why do you designate them refunds and exchanges, and include them on income?

A. That is on South Pacific's books.

Q. We have South Pacific's books here. Please show me where that is.

A. I can show that to you. Here is a check, the first one on the book, on this page No. 102.

Q. Please read it.

A. Check No. 1017, "H. P. Hanthorn loan \$2,-908.74."

The Court: That is on the books of South Pacific?

The Witness: Yes. And then by journal entry at a later date they took this item, along with many others, and included it in refunds.

Q. (By Mr. Reed): I don't understand that, where that would be refunds. You haven't clarified the use of the name Hanthorn.

A. If Cy Sterns got the money we called it income.

Q. Even though the books showed it was a loan?

A. Because he was on a bank deposit basis. You can't depend on what the books say, because Perneti said it was part of Mr. Sterns' commission.

Q. Where is Perneti? Why didn't you have him in here? [284]

A. Don't ask me that.

Q. You have an item there marked H. P. Hanthorn. It apparently has no connection with Cy Sterns, and yet you charge it into his income.

A. Yes.

(Testimony of O. E. Cummins.)

Q. It is marked as loan. Mr. Cummins, did you verify very recently whether or not Mr. Sterns was in the County Hospital? A. I did not.

Q. In your analyses, how did you arrive at the amount of commissions South Pacific paid to Mr. Sterns?

A. I didn't arrive at the amount of commissions. I arrived at the bank deposits plus items received, and converted into cash. I didn't arrive at any such thing as a commission.

Q. You have South Pacific's books, the invoices. They are in evidence as exhibits. That showed all the purchases of the liquor that Cy Sterns handled through South Pacific, and yet you came up with such a great difference in your liquor purchases that you allowed him. It is confusing, I am sure, to everyone, as to how there can be such a great discrepancy between your figures and the books. I wish you would explain how you arrived at that figure from the books.

A. I didn't arrive at that figure from the books. I arrived at it from bank deposits and drawings from bank deposits. [285]

The Court: May I suggest this: Perhaps I can get it through a question.

When you used the bank deposit method for reconstructing income, you regarded all receipts as "income," is that right?

The Witness: Except cash. We only picked up cash where it was extended for something that was an asset, like a cashier's check.

(Testimony of O. E. Cummins.)

The Court: Then in dealing with offsets against what you call gross receipts, under this method, what do you use for offsets, just cash disbursements?

The Witness: Well, anything that Mr. Sterns paid to South Pacific to reimbursement them for any shortage they may have between sales and the cost of sales, as reflected on their books. To put it another way, Cy Sterns didn't pay for any of this liquor except through checks he advanced to South Pacific to settle the account between them, according to their agreement. South Pacific's checks paid for every invoice of liquor that was purchased.

The Court: South Pacific, you say that your examination showed that South Pacific would pay a distributor, for instance, the people who distribute Rocky Springs whiskey, the Old Monastery Company, South Pacific would pay Old Monastery Company for the whiskey they would send South Pacific? [286]

The Witness: That is correct.

The Court: Then South Pacific would make deliveries to certain customers that Mr. Sterns would bring in.

The Witness: That is right.

The Court: And some of those customers would make payments to South Pacific, is that right?

The Witness: Yes. Probably 90 per cent of them were paid. They used that fund to reimburse them for the cost.

The Court: Just a minute. For this moment I

(Testimony of O. E. Cummins.)

am asking questions. Don't let's get off the track.

Then there would be a difference owing to South Pacific, the difference between what it paid to the supplier of whiskey and what the customers paid to South Pacific for whiskey.

The Witness: That is correct.

The Court: That would have to be paid by someone. Would Mr. Sterns pay that?

The Witness: That is what has been allowed to him.

The Court: When you allowed him something for cost of merchandise, you would allow him simply the amounts that he paid to South Pacific?

The Witness: That is right.

The Court: Your method then would employ a certain kind of cost, your method necessarily involves a certain kind of cost. And the method used by the accountant for the Petitioner, [287] which is represented by Exhibit 11, for 1943, page 1, would use another kind of cost. It is a cost based upon merchandise purchased for the account of Mr. Sterns.

And that figure is a different figure than the figure that you used for costs, isn't that right?

The Witness: That is right.

The Court: So, Mr. Reed, in your cross examination there is no use trying to refute the witness' testimony about his method, unless you want to make sure the Court understands the method he used. The Court understands the method he used.

(Testimony of O. E. Cummins.)

The Court wants to be sure you understand what is involved in using the bank deposit method.

Mr. Reed: I have read all the cases on the bank deposit method. I am confused on his application of it.

The Court: Are you now confused on this element of cost?

Mr. Reed: The figures are so inconsistent with actual facts——

The Court: Speak to your accountant. Is it clear?

Mr. Radke: There are two different principles used.

The Court: Mr. Radke, do you understand the point the Court is trying to make Mr. Reed see?

Mr. Radke: I understand to this extent: We have taken our figures from one element. Mr. Cummins has approached it from an entirely different angle. [288]

The Court: There is nothing confusing about it?

Mr. Radke: There is nothing confusing about it, although——

The Court: Will you explain that to Mr. Reed?

Mr. Radke: There are some points to be cleared up that Mr. Reed can present to Mr. Cummins in a proper method that will show there are errors in his computation——

The Court: Supposing you sit over there with Mr. Reed, if you will, please, and suggest a few questions to him. I think it might be worth taking another short recess.

(Testimony of O. E. Cummins.)

(Short recess taken.)

Mr. Reed: I am finished with the witness, your Honor.

The Court: You have some other questions?

Mr. Burrell: Yes. I feel one thing must be cleared up, although the answer stands.

The Court: Just ask the question. Go ahead.

Redirect Examination

Q. (By Mr. Burrell): Mr. Cummins, you were present at a conference attended by Mr. Reed, Mr. Radke, myself, and possibly some other persons, two or three occasions, weren't you, in discussing this case? A. Yes.

Q. At any one of those conferences were the matters of [289] finances or collectibility of any deficiency of Mr. Sterns discussed? A. Yes.

Q. Did you make any statement in that regard at any time? A. Yes.

Q. What was your statement?

A. My statement was that I first worked this case by adding up total bank deposits and computing a tax without any adjustments, and sent my report through.

Some way or another the technical adviser in our office got hold of the report and called me up. They said, "What is the idea here of setting up a case with some \$250,000.00 additional tax and no penalty?"

"Well," I says, "to begin with, I don't think the case is worth spending too much time on, because

(Testimony of O. E. Cummins.)

I only found a few assets on which we could collect a tax." And I told him what those assets were.

Q. What year are you referring to now, when you say you only found a few assets? What time would that be?

A. That would be sometime in '46 or '47.

Q. Thank you. Go ahead.

A. Mr. Sullivan asked me, he says, "Well," he says, "we don't want cases worked that way." He says, "We want the right answers." He said "How long will it take to work the case?" [290]

"Well," I said, "it will take at least 120 days, for the reason I have got to visit every retailer that sales have been made to and have got to run the serial numbers through the Alcohol Tax Unit, to know where the liquor was delivered."

He said, "Go ahead and work it." He says, "We want the right answer."

My report was sent back to me, and as a result I rewrote the report.

Q. Do you recall any other statement you made at that time or any other conference at which Mr. Reed or Mr. Radke was present, as to the collectibility or assets of Mr. Sterns?

A. No, I don't recall any other statements now.

Mr. Burrell: May I say, your Honor, in my opinion this is all beside the point. My witness had been challenged on the point and I wanted to clarify it. That is all.

The Court: You may step down. Thank you.

(Witness excused.)

The Court: Were Exhibits 11 and 12 prepared by the accountant for Mr. Sterns?

Mr. Reed: Yes.

The Court: May he take the stand, please? The Court would like to ask him a few questions.

Whereupon,

RAY RADKE

recalled as a witness for and on behalf of the Court, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

The Court: Mr. Reed, will you give your witness a copy of Exhibits 11 and 12?

Mr. Reed: Yes.

Q. (By the Court): Turning to page 1 of Exhibit 11, Mr. Radke, relating to 1943. Have you explained the method that you used in computing gross income and net loss?

A. Your Honor, the sales—I have taken the sales as made under the agreement entered into between Sterns and South Pacific on all commodities of brands they handled for him. That is your item—I have taken the exact figures as shown by South Pacific sales of commodities of liquor, brands of liquor sold for Mr. Sterns' account, which is item 1 in this report of mine.

In addition to that, there was computed, and I believe the information was furnished by Mr. Sterns, estimated, of odd cases of various brands he had sold, which would be item 2 of net sales, which gave me my gross sales for the period. [292]

(Testimony of Ray Radke.)

On cost of merchandise sold, I have taken the original billings by the distillery to South Pacific and considered those cost of merchandise.

In addition to that, on an estimated basis, to apply against odd sales by Mr. Sterns, I have applied his estimated cost off of that as of December 31st, and I taken taken off the inventory of record in South Pacific Wholesale's books of the only leading brands of Mr. Sterns' liquor, which gives me a net cost as shown in the report of \$166,122.81. That is how I arrive at my gross income.

Now, the ordinary and nominal expenses, such as salaries, are listed in rotation, office salaries and so forth, which are normal operating expenses, and were substantiated, as in the rear of my report, and an analysis made by either canceled checks or cash receipts. I am reluctant to admit it, but somewhere in the last two years, in being transferred from one attorney's office to another, in that the envelope containing signed receipts for cash disbursements—they are not very large to start with—but they have been lost. Canceled checks, which I state are substantiated by checks, are in my possession. I have no canceled checks or cash receipts to show the last three items in this report, which are California tax, liquor tax, reported only by the agreement between Cy Sterns and South Pacific, that he would pay, in addition to the original cost [293] by the distillery, under the consideration—and the agreement between them—that people don't give

(Testimony of Ray Radke.)

things away he had to pay it. That is how I arrived at a loss for that year.

Q. Then your schedule of gross sales cost, gross income, expenses and net loss are a composite in which some of the figures are taken from the books of South Pacific Wholesale.

A. The majority of them.

Q. For sales, some of the deductions are taken from cash receipts and some of these items are estimated.

A. Very few are estimated. Just two items in there. That is the estimated additional sales by Mr. Sterns and estimated additional cost of purchases.

Q. Then it is true, is it not, that the way this business transaction is carried out was that South Pacific used its capital to purchase inventories of liquor?

A. Partially; partially.

Q. And some of Mr. Sterns' customers made direct payments to South Pacific?

A. That is true. Some of the customers' checks, in the paying of South Pacific's billings, were used by Mr. Sterns; some went to South Pacific direct.

Q. But Mr. Sterns never set up a set of books in which he had an asset account of liquor handled by South Pacific. [294]

A. Not to my knowledge. I wasn't associated with Mr. Sterns at that time. I have never seen——

Q. Is there actually a correct way of computing income—I understand that Mr. Sterns' returns were set up on the cash receipts and disbursements basis, isn't that correct?

(Testimony of Ray Radke.)

A. I don't know. I have never seen the returns.

Q. You didn't make up his returns?

A. No.

Q. I assume they were, unless someone advises the Court they were not.

Mr. Reed: I believe that is correct. The inventory being involved, it would be utterly impossible to keep it on the cash basis.

Q. (By the Court): He didn't carry any inventory and he wasn't actually buying the large amount of liquor that was involved, but it is true, isn't it, that Mr. Sterns would pay a net amount to South Pacific, which would represent what he collected from customers?

A. No, I don't—

Q. South Pacific ought to have delivered all the liquor, because it had the liquor licenses?

A. That is correct.

Q. And some customers would pay South Pacific directly for deliveries? [295]

A. Yes.

Q. Some customers would pay Mr. Sterns directly?

A. Yes.

Q. And Mr. Sterns would have to turn over what he collected to South Pacific. South Pacific had to be reimbursed for liquor it purchased?

A. No, your Honor. I couldn't testify that is correct, because—

Q. What do South Pacific's books show?

A. They show items received at times from Mr. Sterns.

Q. I am talking about the bulk of liquor, per-

(Testimony of Ray Radke.)

haps from the three people, Rocky Springs, Baltimore Club and U.L.D., and some others.

A. As to the payment of those invoices——

Q. I am talking about the original purchase, South Pacific paid for that liquor, isn't that right, in the first instance?

A. That is right, actually they paid for it.

Q. Actually their books show that.

A. Yes.

Q. South Pacific, under agreement with Mr. Sterns, expected to be paid——

A. That is correct.

Q. ——for inventories of liquor it purchased—— [296] A. Yes.

Q. ——and it got its payment from two sources, directly from Sterns' customers and from Sterns, is that correct? A. That is correct.

Q. In setting up any books for Mr. Sterns or any recapitulation for Mr. Sterns, for his receipt of cash and disbursements of cash, on a cash basis, you would properly limit your analysis to what Mr. Sterns actually paid over in cash and you wouldn't include as something he paid in cash the money that 15 or 20 customers paid directly to South Pacific.

So your statement on page of this Exhibit 11 is one that is prepared according to a theory that you have.

Page 1 was not received in evidence, but I think perhaps I will receive all of these reports in evidence for what they are worth.

Mr. Burrell: Yes.

(Testimony of Ray Radke.)

The Court: Because we have had a good deal in the record about them.

There is one thing I want to inquire about, which Mr. Reed seemed to give up this morning, I don't think he really needed to. It has to do with these items of deductions. I have two or three questions on those. I am still talking about 1943, and I have to cover the same grounds for 1944, if it won't take too long. [297]

Q. (By the Court): When you looked over the books of South Pacific, who actually paid the liquor taxes?

A. They were, reports filed with the state by South Pacific Wholesale Company. It was paid by their check.

Q. Did you find any checks, evidence of payment by Mr. Sterns to reimburse South Pacific for those payments of taxes?

A. Not in a like amount. Not in a like amount for any certain set period.

Q. So in this schedule, when you put down the three last items, that totals about \$13,000.00.

A. They will total \$23,000.00, the last three items.

Q. \$23,000.00? A. Yes.

Q. Those figures are actually taxes, but they do not necessarily represent actual payments by Mr. Sterns, isn't that correct?

A. I have no substantiation by check to show that Mr. Sterns reimbursed South Pacific for those taxes. I will testify to that.

(Testimony of Ray Radke.)

Q. You make an assumption there he must have done it?

A. There is a contract introduced in evidence that obligated him to do it.

Q. That is still an assumption, as to whether he did [298] what his contract called on him to do.

A. Yes. I assumed that he did.

Q. That is still an assumption.

A. Yes, it is, your Honor.

Q. These things are matters of proof. A taxpayer reporting income on a cash receipt and disbursement basis, as you know perfectly well, could not take a deduction for taxes paid or for an expense of any kind in 1943, other than in the amount of what he actually paid in 1943.

A. That is correct.

Q. And if he were obligated to pay some of this tax by way of reimbursing South Pacific for its payment of tax, and he paid some of it in '44 or '45, he would deduct in those later years the amounts which he reimbursed South Pacific.

A. That is correct. It is established that he is reporting on a cash basis?

Q. You have used, assuming when you put down as a deduction a figure of \$10,339.20 in 1943, and the others——

A. That is correct.

Q. ——that must be the Court's conclusion. and is.

A. That is correct.

Q. Going back to these other items above the last three, I don't want to take up the record by reading them, and you have them there on the ex-

(Testimony of Ray Radke.)

hibit, but keeping in mind that the taxpayer can take a deduction only for the cash [299] expenditure in 1943, did you, in making your analyses—and here you are a little bit in a position similar to that of the agent, as he made an analysis——

A. That is true.

Q. ——I have heard his testimony, and I am willing to hear yours. That is perfectly fair. Tell me, please, how many of these items, as set forth in dollar amounts, were ascertained by you to have been actually paid in the amounts stated during 1943.

A. Your Honor, when this report was originally prepared by me, I made an original report for Mr. Sterns, as I stated, approximately two years ago. Every item in there was verified by either a canceled check or a signed receipt by whoever the man was it was paid to. In the meantime——

Q. Did he get signed receipts for all the commissions he paid?

A. I have them. See, in the analysis, further back on page 17 is an analysis of each expense item shown in the P & L statement on page 1. It states in there the items there by cash—when I put in “by cash” I had a bona-fide receipt in my possession or I would not have put it in. Items substantiated by canceled checks, as so stated, I have the canceled checks in my possession.

Your Honor, the last three items again, as shown, which is the brokerage and liquor tax—— [300]

Q. You have added two together on page 18——

A. That is correct. I believe that was all for tax,

(Testimony of Ray Radke.)

\$11,000.00 was added together. Those items were, as you have stated, and are taken into consideration, an assumption.

Q. Would your testimony be in substance the same for 1944?

A. Yes, the same method was used.

Q. Where is the table explaining your deductions in Exhibit 12 for the items of expense?

A. Pages 11 and 12; identical method was used.

Q. On page 11 there are a good many items of cash to South Pacific Wholesale Company.

A. Those items are not verified. I have no receipts for them. I have no receipts for any cash items here. They have all been lost, your Honor, I am sorry to say.

Q. Were they verified originally?

A. They were verified at that time by a periodic settlement statement that Mr. Sterns had with South Pacific, where they would make their occasional settlements by cash; they were submitted to him by South Pacific.

The Court: Have you any questions you want to ask this witness, Mr. Burrell? I am going to receive Exhibits 11 and 12. Before I do, do you have any questions? [301]

Cross Examination

Q. (By Mr. Burrell): Is there evidence from South Pacific's books showing the periodic settlement by South Pacific to Sterns?

A. There is no evidence in the books to show it.

(Testimony of Ray Radke.)

They prepared a little work sheet that would end up saying what they collected out—what they paid out for him. For instance, say \$3,700.00 was due him and there was probably a check issued for that like amount.

The Court: Where are those?

The Witness: I don't have them. I had them at one time. There have been a lot of things lost out of the papers of Mr. Sterns'.

Q. (By Mr. Burrell): We all understand substantially the agreement between South Pacific and Mr. Sterns. Did South Pacific Company keep books which properly reflected their agreement and the operations under that agreement?

A. Not properly.

Q. Did they set up the understanding, or the understanding was that Mr. Sterns was to receive the 15 per cent legally allowed mark-up on the cost of the liquor from South Pacific.

A. That is correct.

Q. Did they set up an account to show for him that 15 [302] per cent? A. No.

Q. Did they set up an account to show their expenses in respect for the purchases of Mr. Sterns?

A. Not in respect to his purchases.

Q. How could they strike balances from time to time to show what is due to Mr. Sterns?

A. They must have had their own method. I wouldn't know how they did it.

Q. Did they strike balances from time to time

(Testimony of Ray Radke.)

and pay moneys to Mr. Sterns, pursuant to the agreement?

A. That is right. I have seen some of the settlement statements.

Q. From your analysis of the books, can you tell whether or not they actually paid in final balances which represented profits to Mr. Sterns under that 15 per cent due him? A. No, I can't.

Q. You couldn't tell that?

A. No, I couldn't.

Mr. Burrell: That is all, Your Honor.

The Court: Exhibits 11 and 12 are received in evidence.

(The documents heretofore marked Petitioners' Exhibits Nos. 11 and 12 were received in evidence.) [303]

The Court: You may step down.

Mr. Reed: May I ask Mr. Radke a question?

The Court: Yes.

Q. (By Mr. Reed): You heard testimony to the effect you attended a conference with me and Mr. Cummins and Mr. Burrell in the Bureau. Do you recall that a loan from Oscar Ross to Cy Sterns was discussed? A. That is right.

Q. Would you please relate the gist of that conversation?

Mr. Burrell: Does your Honor feel this is material to the issues? I object to it as being immaterial and irrelevant.

The Court: I can hardly tell before I hear it. Go ahead.

(Testimony of Ray Radke.)

The Witness: There was a conversation as to—on Mr. Sterns' financial status, as of the end of the period of business of 1944, and who made the remark I don't know—it might have been Mr. Reed or myself or somebody—but Mr. Sterns stated he owed Oscar Ross somewhere around \$30,000.00 or \$32,000.00 for loans, which Mr. Cummins—he said, "They are not loans. They show in Mr. Ross' books as loans, but" he said, "I made a transcript of the books and that was just Ross' way of burying blackmarket payments, as they could not [304] show on his income tax." And he says, "Those loans still show on his books and they will never be paid."

The Court: Anything else?

Mr. Reed: Yes.

Q. (By Mr. Reed): Was the amount of sales of liquor from Sterns to Ross discussed? If so, relate that conversation. A. The sales?

Q. Of liquor from Sterns to Ross.

A. There was a discussion of it, and I think the gist of the discussion was that Mr. Sterns had not sold much liquor to Mr. Ross. It was a very nominal amount. I don't recall, but maybe twelve hundred, thirteen hundred, fourteen hundred dollars, something like that.

Mr. Reed: That is all.

The Court: You may step down.

(Witness excused.)

The Court: Mr. Clerk, would you look to see

how many exhibits were marked for identification and have not been received?

The Clerk: Respondent's Exhibit P and Petitioners' Exhibit 17. Those two have not been received in evidence.

The Court: May I see P and 17?

Did you note a description of it?

The Clerk: No, I did not, your Honor. It was [305] taken right to the witness stand.

The Court: You asked Mr. Cummins whether he had seen the original of Exhibit 17?

Mr. Reed: Yes.

The Court: Do you wish to offer that in evidence?

Mr. Reed: Yes, your Honor.

The Court: For what purpose? I don't know what it is, but for what purpose?

Mr. Reed: Your Honor, I have tried to establish the lack of income of the Petitioner during the taxable years on a net worth theory, and I had hoped that Respondent would challenge that theory and try to show that my analysis was erroneous.

Of course, if the Petitioner had assets of any sizable amount after 1944 it would probably be some evidence supporting the Commissioner, that he has secreted.

The Court: I will receive Exhibit 17.

(The document heretofore marked Petitioners' Exhibit No. 17 was received in evidence.)

The Court: May I have your attention, gentle-

men. We are getting to the end, but you will have plenty of time to pack up your papers later.

I will receive P for whatever it is worth.

(The document heretofore marked Respondents' Exhibit P was received in evidence.)

The Court: That takes care of all the exhibits that were offered, I believe. I won't take very long. I will have to ask those who have been assisting counsel to wait for a few minutes.

I want to see Mr. Reed and Mr. Burrell for a few minutes in chambers. We will be finished in about 15 minutes.

(Short recess taken.)

The Court: The Court has listened very carefully to all that has been presented in these proceedings during the past two days, and has examined exhibits as they have been offered, and carefully checked tabulations and figures, and considered the testimony of witnesses.

The Court is not at this time convinced that the Petitioner received net income of \$160,000.00 in 1943 or \$75,000.00 in 1944.

The Respondent's counsel relies upon the testimony of some witnesses who say that they made side payments or what we call payments of overage to Mr. Sterns. Testimony of Mr. McClain is convincing, but his testimony is that he paid something around \$4,300.00.

The testimony of Mr. Luther Smith is vague and not very convincing. I feel that the Respondent's proof is exceedingly weak as to the large amount of net income which is the basis for the deficiencies.

The use of various methods to reconstruct income [307] is perfectly all right. The use of bank deposit method is a recognized procedure.

The agent admitted on the stand, however, that he could not be absolutely certain that there wasn't perhaps a duplication of around \$30,000.00 in his reconstruction in cash receipts, which, under his method, would have to be treated as "income."

Therefore, the Court is not convinced and is not sure that the—in the use of the bank deposit method of reconstructing income, there have not been some errors made. The Court will examine all of the transcript, recheck all the exhibits, and will make a decision under a memorandum findings of fact and opinion as soon as possible after the transcript is received.

The questions presented are fact questions. I do not think it is necessary for counsel for either party to file briefs and I do not wish to have briefs filed. I don't think the Court needs to be aided by the briefs. Therefore, the Court is not requesting briefs. And the Court will take all of the exhibits except some accounting books of the South Pacific Wholesale Company, these bound volumes, which I believe it is not necessary for the Court to have.

Does counsel agree with me?

Mr. Burrell: Yes.

Mr. Reed: Yes, your Honor. [308]

The Court: Then the record will show that those exhibits have been returned to the Petitioner. Otherwise, we will take the exhibits.

I believe, Mr. Burrell, that you wanted to in-

produce photostatic copies of the returns. If the Court is going to decide the case soon we will not hold those very long and perhaps you don't need to go to the expense of having those photostated.

That, gentlemen, concludes the trial of this case.

Mr. Burrell: Do I understand that if Respondent does desire to file a brief we may so advise you while you are here in Los Angeles, at some subsequent date from now?

The Court: If you desire to file a brief, you know that the rules are that briefs must be filed within 45 days.

Mr. Burrell: Yes, your Honor.

The Court: In almost all the offices of the Respondent, they are so burdened with work they don't file briefs within 45 days. I intend to decide this case within 45 days. Therefore, if you elect to file a brief, although the Court does not request it, I think that it would be well for you to notify your opponent Mr. Reed, so that he may also file a brief.

Mr. Burrell: Thank you, your Honor.

The Court: Within 45 days. And it is not necessary for you to advise me while I am in Los Angeles. You [309] could advise Mr. Reed that you are going to file a brief within 45 days, and send a copy of the letter to me and that will put me on notice.

Mr. Burrell: Thank you.

The Court: I really don't think it is necessary, however, but do as you consider best.

I think perhaps I should say to the agent that the Court understands he has spent many hours

of hard work in this case, and his work has no doubt been done with the greatest deal of care under the circumstances. This happens to be a case in which it is very hard to make accurate and absolutely complete analyses of any kind.

Is there anything further?

Mr. Reed: No, your Honor.

Mr. Burrell: No, your Honor.

The Court: That is all. Thank you very much.

(Whereupon, at 5:15 o'clock p.m., Thursday, October 22, 1953, an adjournment was taken until 2:30 o'clock p.m., Tuesday, October 27, 1953.) [310]

The Clerk: Recalling Dockets 37940 and 37941, Ruth Sterns and Cy Sterns. Mr. Reed and Mr. Burrell.

The Court: Mr. Reed, there has been received in evidence as Exhibit P in this proceeding the revenue agent's summary of his investigation. He has made an analysis of bank deposits, and over the week end I had an opportunity to look over the exhibits in this case and I thought that I should recall the proceeding to inquire about the matter of the bank deposits.

Now, let me ask you this: Prior to the trial of this case were you able to have any conferences with Mr. Burrell about the Respondent's determination.

Mr. Reed: Yes, your Honor.

The Court: I noticed that the statement attached to the Notice of Deficiency does not set forth the Respondent's analysis of bank deposits, and the Re-

spondent's Answer does not set forth that analysis.

So I think it is possible that in the beginning of your considerations of this case, you might not have known about the Respondent's analysis of bank deposits. I want to be sure before we end the record what the Petitioner can do to explain his large bank deposits in the years 1943 and 1944.

I don't feel that we are finished with that [314] aspect of the case. Mr. Radke, the accountant, who is also here today, prepared a statement for the Petitioner, Exhibits 11 and 12, in which he analyzed what Mr. Sterns would receive from the sale of liquor handled by the South Pacific Wholesale Company. That exhibit has been explained as also involving some estimate because you do not have complete books and records from Mr. Sterns and we don't have any account statement from South Pacific Wholesale Company about all its transactions with or for Mr. Sterns.

The request was made during the trial last week for such statement, and my recollection is that the Court was advised there was no final accounting or statement made by Southwest Pacific, none showed on its books. Is that correct?

Mr. Radke: That is true.

The Court: The Petitioner, in effect, is charged with having realized unreported income with over-ceiling sales and he admits that he did receive some income from over-ceiling sales. There is a little conflict now in testimony.

Mr. McClain has testified that he made payments for liquor to Mr. Sterns in amounts representing

over-ceiling payments. And he denies that he ever received any Old Granddad Whiskey or any other standard brand whiskey or liquor from Mr. Sterns.

I think the Petitioner ought to be given one more [315] opportunity to answer some of the testimony which is in direct conflict with his own, and also that he ought to explain, make every effort to explain what these bank deposits were. Now, what can you do, Mr. Reed.

Mr. Reed: I believe, your Honor, that the evidence will show that Petitioner collected large sums of money, that his customers gave him in cash and in checks substantial amounts, which he treated as advance payment and later returned to those he couldn't deliver liquor to, and the evidence will also show that large amounts of moneys were transferred to South Pacific.

Also that South Pacific periodically accounted to Petitioner for the net result of their operation, that is, the profit to Petitioner, and their books so show. We have the books in court.

The Court: According to Exhibit N, checks of Mr. J. H. Randolph, he made payments directly to South Pacific for liquor that was delivered to him. We don't have other checks of purchases of liquor from the South Pacific, but Exhibit N was offered as an example of the procedure payment direct to South Pacific by those who purchased liquor.

The inference to be drawn from that item of evidence is that all of these bank deposits were not deposits of payments received by Mr. Sterns for

liquor held by and delivered by South Pacific Wholesale. [316]

Mr. Reed: Yes.

The Court: We have Exhibits R and Q, photocopies of checks of South Pacific Wholesale Company to Mr. Sterns. These can be totaled. But they are in amounts of less than a thousand, up to \$8,522.70.

Exhibit Q, checks for 1943 of payments that run as high as \$10,000.00. And the inference to be drawn from these is that these represent the payment to Mr. Sterns of profit, his share of profit on the sale of liquor by South Pacific. If these were totaled they would not come to very large amounts, so they don't account for a great deal of the gross deposits.

Exhibit H are invoices of South Pacific to purchasers of liquor delivered by South Pacific, Smith, McClain, Randolph. I think those are the persons to whom liquor was sold under that exhibit. Those exhibits were offered to indicate that payment for cases of liquor were made to South Pacific upon delivery of the cases of liquor to the purchasers.

We returned an exhibit to you the other day that is one of the accounting sheets from the books of South Pacific. Did you bring that back today?

Mr. Reed: I am sure we did, your Honor. I just don't know what it is you are referring to.

The Court: May we have that again? They were taken out of the book, Mr. Radke.

Mr. Radke: The invoices, you mean? [317]

The Court: No. Let me see that again, that minute sheet.

Mr. Reed: We returned everything we took from here. We haven't touched our files.

The Clerk: They were four binders.

The Court: J, K, L and M are four binders of South Pacific. Those were returned. It was a journal of South Pacific Wholesale Company. I think I have reference to Exhibit I.

Mr. Reed: Yes, this here (indicating).

The Court: Then I am mistaken in referring to some sheets that were detached. Where in those books do you have a summary of account with Mr. Sterns?

Before you get into that, to what did you have reference a few minutes ago, Mr. Reed, when you said there had been presented to the Court something showing the payments of South Pacific to Mr. Sterns or Mr. Sterns' payments to South Pacific?

Mr. Reed: I believe——

The Court: What did you mean?

Mr. Reed: ——the testimony showed that there had been large payments from Mr. Sterns to South Pacific.

The Court: That is testimony.

Mr. Reed: Yes.

The Court: Well now, is there testimony to [318] corroborate that testimony?

Mr. Reed: I believe Mr. Cummins testified that he gave the Petitioner credit for having paid South Pacific approximately \$97,000.00 in the year 1943.

The Court: Well, you might ask Mr. Cummins

now to make that clear. Here is Exhibit P. I don't mean that Mr. Cummins should take the stand now, but he might show you in Exhibit P what there is there.

Mr. Reed: In Mr. Cummins' analysis he allows payments from the banks to South Pacific in this amount.

The Court: \$97,607.61——

Mr. Reed: Yes.

The Court: ——for 1943. How much is allowed for 1944?

Mr. Reed: \$45,695.00.

The Court: But even allowing for that, the agent's report shows his calculation, that there is \$160,492.00 for 1943, and \$75,615.00 for 1944, which cannot be explained as anything, other than income, according to bank deposits.

Now, my inquiry has to do with those balances.

Mr. Reed: Your Honor please, those net incomes arrived at by the agent were shown to be arbitrary due to the fact there were many redeposits and transfers that just could not possibly be income. For example,——

The Court: I recall all of that. What I want to [319] know is this, Mr. Reed: If the Court requests the Respondent to have the bank records brought in, which have been subpoenaed, and which are available, will the presence of those bank records help Mr. Sterns to explain some of those deposits?

Mr. Reed: I don't believe so, your Honor.

The Court: Do you want to ask him? He is in the courtroom.

Mr. Reed: Mr. Sterns would further testify that he drew large cash payments from his accounts, which accounts will show evidence of—and transmitted those moneys to South Pacific, which, under the Government's theory of the case, they do not give Mr. Sterns credit for.

It is quite evident from an analysis, from the purchase invoices in the books, in 1943 there was approximately \$200,000.00 of liquor purchased for Sterns' account, through South Pacific.

The Court: That is true. But the Respondent has introduced evidence that customers paid South Pacific.

Mr. Reed: Yes, that is true, your Honor, but——

The Court: So that unless we have an accounting from South Pacific, which will show how much of the principal amount for all of the liquor it handled was paid by customers, and how much of the principal amount was paid by Mr. Sterns, Mr. Sterns having received payment from customers, then the whole matter remains in an uncertain state and it is impossible [320] to make a finding on the matter of how much of the principal amount of the cost of the liquor was paid to South Pacific by Mr. Sterns, rather than by purchasers.

It seems to me that one direct way of getting the facts about this matter would be to look into the records of South Pacific, to find out whether the records show what it collected from customers and what it collected from Mr. Sterns.

Mr. Reed: Your Honor——

The Court: Mr. Radke is here and I would like

to ask Mr. Radke what the problem is. I understand, Mr. Radke, you have gone over the books of South Pacific.

Mr. Radke: That is right.

The Court: What is your problem?

Mr. Radke: When these books were maintained, which, of course, I did not maintain at the time, there is no daily breakdown of who the cash was received from. Whatever went into the bank was considered cash received. They kept no records of who the money was received from. These are the original books and they don't disclose that.

The Court: Then, Mr. Reed, we have to fall back on Mr. Sterns' record. If he made payments in cash to South Pacific and doesn't have any record of it, he is unable to produce any evidence directly on the point, is that the situation?

Mr. Reed: That is substantially so, your Honor. [321] But the evidence is shown that South Pacific only collected \$2.00 a case for their services.

The Court: Don't make me go over that again. We are dealing with bank deposits. The Petitioner is charged with having received a large amount of net income, as evidenced by the flowing in and out of money from his bank account.

Mr. Reed: Yes.

The Court: Your burden of proof does involve some explanation of those large amounts passing through Mr. Sterns' bank accounts in the years. It has been demonstrated here that not all of the principal cost of the liquor was paid for by Mr. Sterns.

Mr. Reed: Right.

The Court: Therefore, you cannot say that because South Pacific bought \$200,000.00 worth of liquor, for example, that \$200,000.00 worth of deposits and withdrawals from Mr. Sterns' bank account must represent his receipts from purchasers and his payments to South Pacific of the principal cost of the liquor.

There is evidence that purchasers received invoices from South Pacific with the delivery of cases of liquor. There is a strong inference that all of the liquor that was delivered by South Pacific was accompanied by invoices of South Pacific, and that the drivers or other representatives of South Pacific collected payment of those invoices upon [322] delivery of whiskey to customers.

Mr. Syracuse was here for a short time. He wanted to be heard out of turn and then excused. The Court heard him. We didn't have enough time to examine him, and I don't see him here today.

Mr. Reed: We can have him tomorrow. He is in San Diego, I believe, this afternoon.

The Court: We don't have anything that provides a basis for making even a rough estimate of how much of the principal cost of liquor was paid to Syracuse, or to South Pacific by Mr. Sterns and how much was paid to South Pacific—

Mr. Reed: Your Honor please, I believe Mr. Cummins has acknowledged that the greater funds than \$97,000.00 went from Sterns to South Pacific, but he refuses to give Sterns credit for those payments, because he says they are cash payments and did not come out of his account.

The Court: He gives him credit.

Mr. Reed: The greater sums than \$97,000.00 for 1943, he refuses to give him credit for it on the grounds it didn't come out of Mr. Sterns' bank account.

Is that correct, Mr. Cummins?

Mr. Cummins: No, it is not.

The Court: You are here, Mr. Cummins. What do you have to say about that?

Mr. Cummins: These cashier's checks that were used [323] to pay South Pacific for liquors purchased by Mr. Sterns were partly paid by personal checks and the balance by large amounts of cash. I have given him credit for the total amount of the cashier's checks that he used to pay South Pacific. We have the bank records here to show the cash was used to buy these cashier's checks.

Mr. Reed: Mr. Cummins, in my understanding, and our negotiations before this hearing, you refused to allow us any cost of goods sold beyond \$97,000.00, due to the fact that the payments were made to South Pacific in cash and none were checks.

Mr. Cummins: There must have been a misunderstanding, because that is not true. Practically every one of these cashier's checks are purchased with Mr. Sterns' personal check, plus ten thousand or some item like that in cash, which I have allowed in total in the way of cashier's check for the cost of merchandise, because it was all that was paid to South Pacific.

The Court: What is the total amount of the cashier's checks? Do you have that?

Mr. Burrell: We would have to total it, your Honor, if you would like to give us a moment.

The Court: Does it come to as much as \$97,000.00?

Mr. Cummins: It looks like about \$58,000.00, roughly.

Mr. Burrell: Allowed by cashier's check.

The Court: And the agent allowed \$37,000.00.

Mr. Reed: Those are his personal checks.

The Court: \$37,000.00 more?

Mr. Cummins: Yes.

The Court: The allowance for cost of liquor is \$97,000.00. I could take a recess and let you discuss this, if you would like to. I want to find out one other thing. We have the black notebook of Mr. Sterns', Exhibit G. On this loose-leaf paper there are handwritten notations of names of people and amounts of money. I don't recall exactly what this book is supposed to be, and I think that needs to be made clear, but after that is done I will have to ask you to prepare some kind of an analysis of this, with a total figure for the amounts of individual entries. I can't take the time to add those up.

Mr. Reed: We have a machine here in the courtroom and an expert to help us.

The Court: It can be done during a recess. That is a good idea. You may want to ask Mr. Sterns to testify a little more about what those payments represent.

We have a matter set down for tomorrow morning. If you have to come in again it would have to be tomorrow afternoon. I don't know how much

more we can add to the record in this case, but I thought it was necessary to make an effort to get some explanation for the unaccounted for net amount of the bank deposits, which are termed income in [325] the Respondent's determination.

I will take a recess. Before I do that, Mr. Burrell, is there anything further you now want to offer in this case, since it has been reopened?

Mr. Burrell: I do have two representatives of two of the banks involved in this case present, with original documents available for offering for admission.

The Court: What are those documents, bank statements?

Mr. Burrell: Bank statements and also the application for and the cashier's checks of the precise ones we have been discussing here in the agent's schedule.

The Court: How many bank statements? There would be 12 for each year?

Mr. Burrell: Yes. One of the banks, I believe, only has two statements, the account having been opened and closed in two months. They have been checked by Mr. Radke, against the taxpayer's bank statements.

It was my intention that after they had an opportunity to check them, to offer them in one form or another.

The Court: It seems to me you should offer them to supplement the agent's report, to save time and to save the inconvenience of having the banks' records brought in.

You have relied upon the agent's report. I believe we have to have a little bit more than that. And with that [326] understanding, if you will check over whatever matters you can between you, and after the recess put in the record anything else that is necessary, I think perhaps we will finish this afternoon. Then I believe that I will have briefs filed and give you the dates of the briefs later.

(Short recess taken.)

Whereupon,

CYRUS STERNS

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

The Clerk: Mr. Sterns is on the witness stand, Miss Reporter, and he was previously sworn.

Direct Examination

Q. (By Mr. Reed): Mr. Sterns, you have listened to the difficulty we are having and I would like to have you explain to the Court your explanation of the very large bank deposits and how the payments to South Pacific for liquor were handled.

A. In the inception of the business, the first three cars were paid by me personally. That is, by that I mean I had some money and then I went out and collected deposits from customers. The amount of purchases was \$394,000.00. The records of South Pacific on their bank deposit slips show from whom the money was received. They had paid through [327] the customers direct, or the custom-

(Testimony of Cyrus Sterns.)

ers direct had paid South Pacific approximately \$175,000.00.

Mr. Burrell: Excuse me. Are you testifying now of what these bank deposit slips would show if they were in court?

The Witness: That is right.

Mr. Burrell: Are they here in court?

The Witness: They are.

Mr. Burrell: For the record, I will object until they are here. Otherwise, it is hearsay evidence he is giving.

The Witness: They are right here.

The Court: These are the bank deposit slips of whom?

The Witness: South Pacific.

The Court: Go ahead for a few minutes, please.

Q. (By Mr. Reed): Mr. Sterns, I show you Petitioners' Exhibit for identification and ask you what these are.

A. Those are South Pacific's deposit slips showing their deposits from whiskey delivered to customers and checks paid out to them direct, where I did not pay any money for the delivery of this merchandise. And it shows my brand, which was Rocky Springs and U.D.L., and in fact wherever there was a question of a doubt I charged myself. If there wasn't my name or our name under there, I charged that certain [328] amount to me, instead of taking the advantage of it.

Mr. Burrell: I understand you are offering these, Mr. Reed?

(Testimony of Cyrus Sterns.)

Mr. Reed: Yes, I offer these as Petitioners' exhibit.

The Court: That would be 18.

The Witness: Mr. Reed, don't leave go of those checks. The checks have nothing to do with those deposit slips.

Mr. Burrell: If your Honor please, I appreciate Mr. Sterns' stating they are the deposit slips that South Pacific Wholesale Company—I have no knowledge they are in fact. These are not your records, are they, Mr. Sterns?

The Witness: I was doing business with them.

Mr. Burrell: How did these come into your possession? These belong to South Pacific Wholesale Company.

The Witness: The same as the books, they gave me their books and records.

Mr. Burrell: Do you have somebody here who can identify these?

The Witness: Mr. Radke, I believe, will or can. They were in his possession.

Mr. Burrell: I object to them as being inadmissible.

The Court: Mr. Radke, if you can identify them, do so from where you are? [329]

Mr. Radke: They were tendered to me by South Pacific as part of their records in their investigation. The handwriting on the majority of these I can testify to as being that of Mr. Pernetti, the manager of South Pacific Wholesale.

Mr. Burrell: Mr. Cummins advises me he has a

(Testimony of Cyrus Sterns.)

schedule that should show the detail of all of these. Given a moment we can verify it, and then I would have no objection to them.

These I have not known about previously. Do you wish to continue? He will be checking them in the meantime.

The Court: I think so. Time is getting away from us.

Mr. Burrell: Yes.

Q. (By Mr. Reed): Mr. Sterns, I show you Petitioners' Exhibit for identification——

The Court: 19 for identification.

(The documents above referred to were marked Petitioners' Exhibits No. 18 and 19 for identification.)

Q. (By Mr. Reed): ——Exhibit 19 for identification, and I ask you what those are.

A. Those are South Pacific bank deposits for the year 1944, merchandise which was in our contract and delivered to my customers, but paid for direct by the customers. The [330] total amount of these is approximately \$175,000.00. Merchandise that we had purchased was three hundred—well, I just—two hundred two—I was just giving a round—two hundred two and one hundred forty-seven, and that would be \$350.00, and then two other items of twenty-three, I think, and twenty-four thousand, totaled approximately four hundred thousand.

The Court: Mr. Baird, is the next exhibit of the Petitioner 18?

The Clerk: Yes, your Honor.

(Testimony of Cyrus Sterns.)

The Court: You can continue, please.

The Witness: The balance of that money to pay for this merchandise came direct through me, or loans that were made by South Pacific from the banks and deducted as we delivered the merchandise. Most of it came through me. The former collections that I had deposited in the bank.

The Court: How much came through you?

The Witness: Well,—

The Court: Amounts that South Pacific obtained by loans wouldn't clear through your bank account?

The Witness: No, they would not, your Honor.

The Court: We are trying to find out something about your bank deposits. Have you any way of ascertaining how much you paid?

The Witness: I think Mr. Radke may have a—would [331] it show on which cars they borrowed money from their bank?

Mr. Radke: No, I don't have the detailed breakdown on that.

The Witness: Well, there is a matter of thirteen or fourteen thousand cases, and I know with the exception of the one hundred seventy-five thousand, that that the money came through moneys that I deposited in the bank, and so forth.

The Court: So that isn't clear to me. I don't know. You are talking about cases of whiskey. You get away from the point where I can follow you. You start out by referring to three cars, and I don't know how many cases are in a car.

The Witness: In some of them, there is usually

(Testimony of Cyrus Sterns.)

a minimum of fifteen hundred and they run up to twenty-two hundred in a car. May I ask this off the record, your Honor?

The Court: No, we have to stay on the record now. But go ahead and ask it on the record.

The Witness: What I want to ask is I think we could possibly go to the Hollywood State Bank and find out on their notes, which were for U. D. L. and which were for Rocky Springs. They would designate that on their notes as they made them, I presume. I don't know that is correct. Is that correct? Am I correct there?

Mr. Radke: I don't know whether they would do that.

The Court: It is a little late to do that. If you could do that later and take care of it by stipulation—— [332]

The Witness: The discrepancy here, I don't know whether it was brought up in testimony or not, but Mr. Cummins claims merchandise in 1943 cost \$97,000.00 and it was \$230,000.00.

The Court: He doesn't claim that. You don't understand.

The Witness: I possibly don't understand how they figure.

The Court: He credits you with having paid \$97,000.00 to South Pacific for liquor.

The Witness: There is another charge against that liquor of about \$40,000.00, to bring the cost up to what the liquor actually cost.

The Court: Customers who bought liquor from

(Testimony of Cyrus Sterns.)

South Pacific made payments direct to South Pacific?

The Witness: That has nothing to do with the cost.

The Court: I don't think we are concerned now with the cost. The agent and attorneys are agreed as to what the cost was. We are trying to find out what passed through your bank account.

The Witness: Mr. Cummins further says that the records show I only paid sixty some thousand dollars. My records showed that in cash and personal checks I paid on those checks \$115,944.00.

The Court: To whom? [333]

The Witness: South Pacific.

The Court: \$115,944.00?

The Witness: Yes.

The Court: That is in excess of what the agent has allowed?

Mr. Burrell: It is, your Honor.

The Court: The agent allows ninety-seven thousand-odd dollars.

Mr. Burrell: Yes.

The Court: And the Petitioner claims that he paid about \$18,000.00, close to \$20,000.00 more to South Pacific.

The Witness: No, no.

Mr. Burrell: For clarity, is he speaking of one year or both years?

The Court: Are you speaking of 1943 or 1944?

Mr. Burrell: In both years we allowed some one hundred forty thousand dollars.

(Testimony of Cyrus Sterns.)

The Witness: What I am talking about, your Honor, is that he had some checks that he said that showed I paid South Pacific. Not the check, for instance, like twenty-seven thousand one hundred twelve, and another thirty, so forth and so on. He claims he shows that I only paid them \$70,000.00.

I have records here and checks to show in that instance, that is not the cost of the merchandise.

The Court: There isn't anything very clear here, [334] Mr. Reed. In reading this I will not get anything out of these statements. I think you ought to assist Mr. Sterns. You know what the agent has determined.

Where is Exhibit P, the agent's report? Give that to Mr. Reed.

The Clerk: Yes, your Honor.

The Court: Do you have a copy of the agent's report. Here is the exhibit right here now.

Mr. Sterns, Mr. Cummins indicates that for the year 1943 you had total gross receipts of \$287,000.00, made up of bank deposits and undeposited checks from South Pacific Wholesale Company, and undeposited currency used.

In adjusting that he arrives at refunds of \$29,564.00 and cost of merchandise of \$97,000.00. Are those figures correct?

The Witness: No, they are not.

The Court: Mr. Reed, I can't just accept categorical denials of that kind. Will you step around, please, to the witness stand?

Mr. Reed: Yes.

(Testimony of Cyrus Sterns.)

The Court: You are not helping the situation now at all. Will you open that report, please? Will you point out to Mr. Sterns the allowance of \$97,000.00 representing his payments to South Pacific out of his bank account?

Mr. Reed: Right here (indicating). [335]

The Court: You see that figure?

The Witness: Yes.

The Court: Will you turn to 1943 and show him the next figure that corresponds?

Mr. Reed: 1944?

The Court: 1944.

Mr. Reed: Right here (indicating).

The Court: What is that figure?

Mr. Reed: What is this figure, Mr. Sterns?

The Court: You tell me.

Mr. Reed: \$45,692.00.

The Court: The agent has credited Mr. Sterns with making payments through his bank account of a total—do I still have your attention or not.

Mr. Reed: Yes, your Honor.

The Court: —of a total of \$142,695.00 Did you hear what I said?

Mr. Reed: Yes.

The Court: Mr. Sterns has been talking at random rather loosely about what he paid to South Pacific. He says that he paid to South Pacific \$115,944.00, without indicating whether that is the total paid in 1943 and 1944, or in just one year.

Now, Mr. Sterns, the agent has given you credit for payments through your bank account of an

(Testimony of Cyrus Sterns.)

amount in excess of [336] \$115,944.00. So that statement that you make doesn't enlighten the Court any more than it knew before.

The Witness: Your Honor, the statement here says cost of merchandise in '43. Now, I am not a bookkeeper and I don't know the way they calculate it, but we have invoices that show, without a question of a doubt, we bought—the cost of the merchandise was \$203,000.00.

The Court: Mr. Reed, I didn't call you back now to lose time in this way. You will have to direct your witness.

Mr. Reed: All right.

The Court: That, of course, is not what is at issue at this point. Mr. Sterns could keep us here for hours arguing with the Court and with the agent about the agent's report.

Now, you will have to control the situation. I called you back to give you an opportunity to make explanation that you could. I assume that, as counsel for Mr. Sterns, you accept certain items in this report as correct. That is, you agree his liquor cost a certain amount, I suppose?

Mr. Reed: If your Honor please, we have stipulated to the gross bank deposit. That is all. My theory of this case, and the Government too, in their Answer and in their 90-Day—in their Answer to the Petition went on the theory that South Pacific acted as an agent for Mr. Sterns. It was in reality Sterns carrying on business through South Pacific. [337]

There I believed, in prosecuting this case for him,

(Testimony of Cyrus Sterns.)

the best way to arrive at the income that he would be taxable upon would be to make an analysis of all the sales and expenditures, and so we took South Pacific's books and such records as Mr. Sterns had, and that was our endeavor to arrive at the next net taxable income.

The Court: Mr. Reed, that still doesn't get us any place. You may as well take that report here (indicating).

Mr. Reed: This report here that Respondent relies upon, I never saw it until I came in the courtroom here.

The Court: I asked you when we started today if you hadn't had some conferences before the trial with Mr. Burrell and if he hadn't advised you that the agent's report was based on bank deposits, and all of that, and you said he had.

Mr. Reed: Yes, but here is the extent of what he gave me (indicating).

The Court: You can't plead surprise entirely.

Mr. Reed: No, your Honor, I am not endeavoring to do that.

The Court: I would like to try to save some time and also save the record. I am now going to ask for briefs. You can state your argument in your brief.

The Respondent has made a determination which is based upon an analysis of bank deposits. You can argue until doomsday that you can determine some of Mr. Sterns' income in [338] the taxable years by analyzing the account with South Pacific. It is perfectly true that you can present to the

(Testimony of Cyrus Sterns.)

Court, through that method, an explanation of some of the Petitioner's income, but that isn't the point. You are not joining the issue when you do that. There is no theory about these bank deposits. They exist. A great many deposits were made in those accounts and withdrawals were made from those accounts. The deposits for each year exceed the withdrawals by a rather large amount, and the determination of the Respondent is that after making allowance for payments for merchandise and certain expenses, that so much of that excess must represent income.

Now, the Petitioner is charged, in effect, in this case with having income from blackmarket operations. It is really part of your burden of proof to go as far as you can in rebutting the inferences to be drawn from the extent of bank deposits. So we thought if Mr. Sterns could explain his bank deposits he would then be making an effort to rebut the inferences to be drawn from the existence of bank deposits which are in excess of withdrawals.

Mr. Reed: Your Honor please, I believe it is already in the record that before the close of 1944 there was nothing left in the banks, and that the testimony was to the effect that all of the funds had been used in prosecuting his business. As a matter of fact, he wound up in debt because of his [339] business.

The Court: You haven't introduced any bank

(Testimony of Cyrus Sterns.)

statements showing balances or withdrawals, or anything else.

Mr. Reed: I believe it is Respondent's intention to introduce the bank statements, your Honor.

Mr. Burrell: Yes. Would you like to have me introduce them at this time? I have them all laid out here in a certain order.

Mr. Reed: Just a moment then. We have Mr. Sterns' record book in evidence. I have had an accountant summarize the totals and I would like to have him testify as to what those totals are.

Mr. Burrell: Why don't you have it identified and then offer it? I don't even know what it is.

Mr. Reed: It is a summary from this (indicating).

Mr. Burrell: What does it show, that he handled that much——

Mr. Reed: It shows the sales and——

Mr. Burrell: It is going in as a summary from these books?

Mr. Reed: Yes.

The Court: It is going in as part of Exhibit G. What is Exhibit G, Mr. Reed?

Mr. Reed: Exhibit G is the Petitioner's record book he kept during the years 1943 and '44. It was made in [340] the ordinary course of business.

The Court: I know, but what is it, moneys received by him from customers?

Mr. Reed: I believe it consists of all sales, whether they went through South Pacific or through his own hands.

(Testimony of Cyrus Sterns.)

The Court: Will you ask him, please?

Mr. Reed: Yes.

Q. (By Mr. Reed): Mr. Sterns, please explain those entries, briefly?

A. Well, that was delivered by South Pacific——

The Court: Mr. Sterns, Mr. Reed doesn't help you enough. I asked you to look at a page in Exhibit G. These are entries, line by line, for October 1943. The names of individuals are here, like Clark, Popelman, Cerp, and so forth.

Then there are some figures, 10, 20, 5. What do these figures mean, 10, 20 and 5, cases of liquor?

The Witness: Cases of liquor.

Q. (By Mr. Reed): What do these names mean?

A. That is the customer's name.

Q. What do the figures at the far side mean, dollars, \$273.95?

A. That is the cost of ten cases that was evidently twenty-seven something a case. [341]

Q. The cost—— A. The sales price.

The Court: The sales price?

The Witness: Yes.

The Court: Did you make these entries in this book?

The Witness: Yes.

The Court: Did you receive those amounts of money?

The Witness: In some cases I did.

The Court: Can you tell from those books which amounts you received?

(Testimony of Cyrus Sterns.)

The Witness: I wouldn't be able to after all these years.

The Court: Your record wasn't kept so as to show what payments were made to you, isn't that true? The records on their face don't show what payments were made to you?

The Witness: Those are the payments that——

The Court: Is there anything on this sheet of paper which shows which payments were made to you and which payments were paid to somebody else? Yes or no.

The Witness: On this page, this was paid to the South Pacific Wholesale Company on this page (indicating).

The Court: How do you know that? There isn't anything on the page that says "Paid to South Pacific"? Yes or no.

The Witness: No. [342]

The Court: Then how do you know that the payments on there were paid to South Pacific?

The Witness: Because, as I explained in the testimony, this was delivered, shipped, not having a wholesale or basic permit at the time.

The Court: That is true with all of this. You didn't have basic permits at any time.

The Witness: I didn't. That is why I had to deal through South Pacific.

The Court: Now, go on. Where in this book can we find any notation that any of these payments were paid to you?

The Witness: I would have to go through those

(Testimony of Cyrus Sterns.)

deposit slips then and see which ones of these were paid direct to South Pacific.

The Court: Which deposit slips?

The Witness: South Pacific——

Mr. Reed: Those are in evidence.

The Court: Oh, no, not necessarily. South Pacific would deposit in its bank a whole accumulation of those.

Mr. Reed, so we don't prolong this unnecessarily, Exhibit G does not show on the face of it what payments were made to Mr. Sterns and what payments were made to South Pacific.

You have had a total made of the items for each year and what are the totals for 1943.

Mr. Reed: The accountant didn't make that for '43 [343] alone; for the two years. For 1943, \$183-144.35. For 1944, \$247,253.63. For the two years, \$430,397.98.

The Court: What is the value of Exhibit G, I would like to know, in this case? It was offered by the Respondent. For what purpose was this offered?

Mr. Burrell: Part of the Respondent's theory, your Honor, that the taxpayer in this instance did not keep adequate books of account, thereby permitting the Respondent to recompute his income under Section 41.

The Court: That is the purpose?

Mr. Burrell: That is the purpose. He was subpoenaed to bring in all his records.

The Court: This recap sheet can be marked as Exhibit G, also. It is part of Exhibit G.

(Testimony of Cyrus Sterns.)

Mr. Reed: There is another item on that recap sheet. It is a summary of the cash refunds and refunds paid by check that are quite pertinent.

The Court: Are those shown in the books?

Mr. Reed: Yes.

The Court: I didn't know that. Then bring that out in some way for the record. Tie it in with bank deposits, please, if you can.

Incidentally, can you be sure those refunds were made to Mr. Sterns and not to the South Pacific Wholesale Company? [344]

Mr. Reed: Mr. Sterns, this book here has a record of cash refunds and refunds by check. Who were they made by?

The Witness: Who were they made by?

Mr. Reed: Yes.

The Witness: Made by me personally.

The Court: Refunds to whom?

The Witness: To various customers that had paid me deposits and I couldn't deliver merchandise to them.

The Court: How did you make those refunds, in cash or by check?

The Witness: Some of them by check and some of them by cash.

The Court: What do they total?

The Witness: The refunds by cash for 1943 total \$31,342.40. The refunds by check for 1943 total \$44,654.75.

Refunds by cash for 1944 total \$14,459.00. Refunds by check for 1944 total \$18,600.00.

(Testimony of Cyrus Sterns.)

The Court: On what pages in Exhibit G do the entries indicate cash refunds, as distinguished from check refunds?

Mr. Reed: Pages are not numbered, your Honor, but at the top——

The Court: Are they labeled in some way?

Mr. Reed: Yes. It is titled "Refunds by Cash, 1943."

The Court: And the refunds by check are on an adding [345] machine tape, are they, and are so labeled?

Mr. Reed: Refunds by check—we have refunds by check with an adding machine tape for '44, and for '43 also an adding machine tape total.

The Court: Where did that adding machine tape come from?

The Witness: I had an adding machine and I totaled these.

The Court: What did you total them from?

The Witness: From these records here (indicating).

The Court: Well, all right. Have you seen that, Mr. Burrell?

Mr. Burrell: No, I have not inspected the book.

The Court: Do you want to look at that now?

Mr. Burrell: I don't believe it is necessary, your Honor. I would like to cross examine on it before he is finished.

The Court: Anything else, Mr. Reed?

Mr. Reed: No.

Mr. Burrell: Before I go further, your Honor,

(Testimony of Cyrus Sterns.)

I would like to take this opportunity of introducing in evidence certain records.

The Court: All right.

Mr. Burrell: I will hand to the Clerk at this time for identification photocopy of certain application for [346] cashier's check, which are the cashier's checks identified in the agent's report heretofore introduced.

The Clerk: S for identification.

(The document above referred to was marked Respondent's Exhibit S for identification.)

The Court: Is there any objection? You had the recess to look at all of this. You ought to know right now what it is all about.

Mr. Reed: No objection.

The Court: Respondent's S is received in evidence.

(The document heretofore marked Respondent's Exhibit S was received in evidence.)

Mr. Burrell: I will hand the Clerk at this time photocopies of the cashier's checks, the checks issued by the bank in question pursuant to the application entered in the exhibit——

The Court: Any objection?

Mr. Reed: No objection.

The Court: It is received in evidence.

(The documents above referred to were received in evidence and marked Respondent's Exhibit T.)

Mr. Burrell: I will hand to the Clerk at this time two typewritten copies of bank statements of

(Testimony of Cyrus Sterns.)

the West Hollywood Branch of the Bank of America on the account of Sterns Liquor Company, for identification next in order. [347]

Mr. Reed: No objection.

The Court: Identification or shall we receive them in evidence?

Mr. Burrell: I am offering them in evidence. If that may be understood, I am offering them in evidence as well as for identification.

The Court: Do you want the photostat copies stamped as exhibits?

Mr. Burrell: Yes, your Honor.

The Court: You haven't given the total copies to the Clerk.

Mr. Burrell: I identify these as typewritten copies. That is what I have in this case.

The Court: Those may remain?

Mr. Burrell: Yes, your Honor.

The Court: That is Exhibit U. Is that correct?

The Clerk: That is right, your Honor.

The Court: U is received in evidence.

(The documents above referred to were received in evidence and marked Respondent's Exhibit U.)

Mr. Burrell: I will hand to the Clerk a group of photocopies of bank statements of the account of Cy Sterns in the Wilshire-La Brea Branch of the Bank of America, and ask they be marked for identification and admitted in evidence.

The Court: Any objection to these? [348]

Mr. Reed: No objection.

(Testimony of Cyrus Sterns.)

The Court: V is received in evidence.

(The documents above referred to were received in evidence and marked Respondent's Exhibit V.)

Mr. Burrell: Next in order I will hand to the Clerk a group of photocopies of the bank statements of Sterns Liquor Company on the Wilshire-La Brea Branch of the Bank of America, and ask they be admitted in evidence.

The Court: Any objection?

Mr. Reed: No objection.

The Court: W is received in evidence.

(The documents above referred to were received in evidence and marked Respondent's Exhibit W.)

Mr. Burrell: Your Honor, in all instances these are copies, whether typewritten or photocopies, of the originals which are here in court. The officials of the banks who brought them in, subpoenaed, are here in court, and I will ask they be excused and ask permission to return the originals.

The Court: It seems to be all right. Is that all right with you, Mr. Reed?

Mr. Reed: Yes.

The Court: The witnesses are excused and the originals are returned.

Mr. Burrell: Your Honor, the bank statements just introduced will total up in deposits to the exact amount, I [349] believe, which shows in the agent's report and which has been stipulated to by the parties herein, with the exception of some three

(Testimony of Cyrus Sterns.)

thousand six hundred or so dollars, which were deposited in an account of Mr. Sterns,' the taxpayer, in the California Bank in the Beverly Hills area. That amount in that bank account is a part of the amount stipulated to in this case.

None of the withdrawals in that account are deemed by the Respondent to be pertinent in this case, because none of them are involved in refunds or transfers and that sort of thing.

So I do not feel it is necessary at this time to offer them additionally. I make that explanation for the record.

The Court: All right.

Mr. Burrell: We might clear one thing in the record, your Honor. Mr. Reed had identified two exhibits, namely, deposit slips for two years of the South Pacific Wholesale Company, but they were not offered.

We have checked them against our own schedule and found them to be substantially accurate. But I will object to their receipt in evidence solely on the ground of being irrelevant. They do not identify who is depositing that money or paying it. There is nothing to prove Mr. Sterns contributed any of the sums of money that show on those deposit slips. [350] That would still remain a matter of his proof by his own canceled checks or receipts, or something.

The Court: Hand those exhibits over to Mr. Reed, please, 18 and 19.

Mr. Burrell: We have absolutely nothing to hide

(Testimony of Cyrus Sterns.)

in this case and I am not making my objection on that ground. We have verified them as being the deposit slips and the correct ones. Our objection is to their relevancy as evidence in this case.

Mr. Reed: We will withdraw these, your Honor.

The Court: I want the record to be clear on these things. Is it true that you can't, Mr. Reed, tie up those deposit slips with withdrawals from Mr. Sterns' bank account?

Mr. Reed: If your Honor please, it would take a great deal of time to analyze Sterns' bank accounts and trace the funds into the South Pacific deposits.

The Court: And you haven't done that yet.

Mr. Reed: No, your Honor.

The Court: You cannot at this time tell from Exhibits 18 and 19 which are deposit slips into the bank account, or which items may have been paid the South Pacific by Mr. Sterns by checks drawn on his own bank account?

Mr. Reed: That is right, your Honor. I rather agree with Mr. Burrell. It is irrelevant because the books that are in evidence show what the bank deposits of South [351] Pacific were.

The Court: They do?

Mr. Reed: Yes, your Honor.

The Court: What books?

Mr. Burrell: Oh, yes, one of the sheets withdrawn from the books and which I believe have been offered here or, at least, handed to the Clerk,

(Testimony of Cyrus Sterns.)

to show the total amounts of cash receipts and deposits.

The Court: That apparently takes care of that. You go ahead, Mr. Burrell.

Cross Examination

Q (By Mr. Burrell): You just testified, Mr. Sterns, that you made refunds to customers in certain amounts for the two years here involved, is that correct? A. Correct.

Q. As a matter of easy computation at my table, those sums you just testified to are in excess of the refunds allowed by the agent in his computations in this case. Did you make any of those refunds by your personal checks? A. A lot of them.

Q. Do you have those checks here in court to introduce? A. Yes, we do.

Mr. Burrell: I think they should be introduced, your Honor. The position we take, your Honor, is we have [352] allowed all those which he can substantiate. I think the record will show we have allowed all his checks.

Q. (By Mr. Burrell): While they are finding those, Mr. Sterns, I will ask you another question. You testified that a balance of the refunds not made by check was made in cash to these customers, is that correct? A. Right.

Q. Do you have receipts——

A. I did have them. Whether they are still available or not——

(Testimony of Cyrus Sterns.)

Q. You don't know whether they are in the courtroom to introduce?

A. They have been thrown around with about nine different attorneys and auditors.

The Court: The question is are they in the courtroom.

The Witness: That I don't know.

Mr. Burrell: Are they, Mr. Reed?

Mr. Reed: I believe so. We may not have that precise amount.

The Court: You may look at those. What is your next question?

Mr. Burrell: About one more question, your Honor. [353]

Q. (By Mr. Burrell): I am directing your attention now only to the cash that you used to make refunds to customers that you are now talking about. What is the source of the cash refunds that you are testifying to? Where did that cash come from?

A. Most of it by deposits in the bank.

Q. How did you withdraw that from the bank?

A. At different amounts.

The Court: How?

Q. (By Mr. Burrell): How?

A. By check made cash to me.

Q. Do you have those checks here to prove and substantiate that, and so you can trace that?

A. I have quite a number of checks here made cash to me.

Q. Were some of these refunds in cash made

(Testimony of Cyrus Sterns.)

out of cash out of your pocket or received from sources other than coming out of your bank account?

A. Sometimes there would possibly be taken from one and paid the other, until I finally cleaned the whole thing out.

Q. You are speaking now of funds which would not go through your bank account?

A. Very little funds I didn't put into the bank accounts.

Q. You are now speaking of some funds that might not [354] have gone through your bank account, with which you used to make these cash refunds? You don't know what that amount is?

A. There may be some of them.

Q. Do you know how much?

A. I can't say that.

Q. Can you identify them?

A. It would be impossible for me to identify them.

Mr. Burrell: That is all the questions at this moment, your Honor.

The Court: With respect to the invoice books of South Pacific, Exhibits J, K, L and M, I believe, are those here in the courtroom now?

Mr. Reed: Yes, your Honor.

The Court: May I have them, please?

I want the record to show that the Court has examined L, J, K and M. These are binders containing South Pacific Wholesale Company's invoices to purchasers. All the purchasers in 1943 and

(Testimony of Cyrus Sterns.)

1944. And the situation is this: South Pacific did business with others and for others, other than Mr. Sterns. The only invoices that we are interested in are invoices showing sales to purchasers of the whiskey that was handled for Mr. Sterns by South Pacific. These invoices on their face do not provide any basis for segregating Mr. Sterns' customers from the other customers of South Pacific.

Therefore, they serve no purpose in the record in [355] this case. They were marked and received in evidence at some point during the trial for the purpose, no doubt, of locating invoices of sales to customers of Mr. Sterns.

I am now returning those to the Petitioner and it is my understanding that the Petitioner doesn't consider them of any value in this case. Is that right?

Mr. Burrell: May I make one comment? They are Respondent's exhibits and were produced——

The Court: I beg your pardon?

Mr. Burrell: ——produced pursuant to subpoena of the Respondent. They came out of Mr. Reed's possession, actually. I will agree they be returned to Mr. Reed if he will return them to Mr. Syracuse of South Pacific.

The Court: I just wanted the record to show that we have considered whether we need to keep these exhibits. There was another accounting book of South Pacific, Exhibit I. During the recess the Court examined that book. Again these are Mr. Burrell's exhibits.

(Testimony of Cyrus Sterns.)

I would like for you to step forward, please, and see what has been taken out of that binder. The Court, during the recess, stated to counsel for both parties that all fragments of evidence would be helpful to the Court.

There are some sheets there that show deposits in the bank account of South Pacific during the period in—the very first page, Mr. Burrell,—during the months in 1943 and [356] 1944 when South Pacific was in business.

Mr. Radke believed that some other ledger sheet should be included. Why are you suggesting that the other ledger sheet be included, Mr. Radke?

Mr. Radke: It is a complete transcript of the books. In other words, it is a summary of all the individual sheets that might be beneficial, and it might not.

The Court: What detail appears on those other sheets with respect to transactions?

Mr. Radke: The accounting for the cash that was collected and the disposition of it into the bank account.

The Court: What kind of accounting? What just exactly do those sheets show?

Mr. Radke: The general ledger sheet, we have a cash account which is in, all items of cash taken in are debited to the cash account.

The Court: You know what we are concerned with in this case. Do those sheets give names?

Mr. Radke: No, they do not.

The Court: The deposits in the bank account of

(Testimony of Cyrus Sterns.)

South Pacific are helpful to the Court because we have an agent's report in which he credits Mr. Sterns with having made some payments to South Pacific. Presumably those payments went into South Pacific's bank account.

Mr. Radke: That is right. [357]

The Court: I asked during the recess if counsel had any checks, canceled checks of Mr. Sterns' in amounts which were the same as the amounts of deposits in the bank account of South Pacific, and Respondent's counsel produced some checks.

Mr. Radke: That is right.

Mr. Burrell: And they are offered in evidence now, your Honor.

The Court: Where are they?

Mr. Burrell: They are one of these late exhibits.

The Court: They are already in evidence?

Mr. Burrell: Yes, they are the cashier's check which we offered.

The Court: They are the cashier's check. I should think the first two pages would be enough.

Mr. Burrell: Yes, that is the opinion of the Respondent.

The Court: Are they, Mr. Burrell?

Mr. Burrell: Yes.

The Court: Let the Court have those first two pages of Exhibit I. The first two sheets show totals per month?

Mr. Radke: Concisely.

The Court: You never said it. The other sheets

(Testimony of Cyrus Sterns.)

show the details in a month, that make up the total for a month? [358]

Mr. Radke: Yes, separate deposits.

The Court: It would be nice if you could express yourself better. That whole thing is received as Exhibit I.

Mr. Burrell: May I return this last exhibit to Mr. Reed, to account to the South Pacific Wholesale Company?

The Court: Yes. You will deliver that to South Pacific?

Mr. Reed: Yes.

The Court: Is there anything else?

Mr. Burrell: Nothing from the Respondent. We rest.

The Court: Can you think of anything else, Mr. Reed?

Mr. Reed: I would like to ask Mr. Sterns just when the accounts were kept regarding refund by cash and refund by check.

The Witness: I had a little memorandum book and as I would make the refunds in the daytime, I would come back at night and enter them into this book.

Mr. Reed: That is all.

The Court: May I have the book, please, to give to the Clerk? Mr. Sterns has some checks here on the witness bench. Are these checks that should come in, Mr. Reed?

Mr. Reed: The Petitioner's opinion is that Respondent doesn't give him credit for these checks,

(Testimony of Cyrus Sterns.)

principally payable to cash, in the Bank of America.

The Court: You decide whether you want to put them [359] in. Now is your chance.

Mr. Burrell: What are they?

Mr. Reed: Here is a check payable to the Bank of America in the amount of \$13,835.36.

Mr. Burrell: What do they represent?

Mr. Reed: Mr. Sterns, what does this check represent?

The Witness: That was a check I gave South Pacific for \$31,363.81, cashier's check to South Pacific, cashier's check, November 14, 1943, \$17,403.00. That is where a lot of the deposits I put in the bank went to.

Redirect Examination

Q. (By Mr. Reed): Explain that check in the amount of \$3,000.00 payable to Cy Sterns, endorsed by Cy Sterns, dated April 29th, what is that?

A. That is one of those checks I had to draw for cash to make some refunds in and around that time.

Q. I show you this check dated December——

The Court: In order to keep the record straight, before you go any further, will you please have those first two checks marked for identification?

Mr. Burrell: He may have them all put in one group, if he wishes. I have no objection to their going in. I don't know what they prove. [360]

The Court: We have two checks that are explained. Each of those checks will be——

(Testimony of Cyrus Sterns.)

The Clerk: 20 is the next number.

The Court: There will be no 18 and 19.

Mr. Reed: I offer Petitioners' Exhibit for identification No. 20 in evidence and ask it be received.

Mr. Burrell: No objection.

The Court: 20 is received in evidence.

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 20.)

Q. (By Mr. Reed): Mr. Sterns, I show you this check dated December 15, 1943, payable to cash in the amount of \$3,000.00, endorsed by Cy Sterns. What does it represent?

A. Cashier's check to South Pacific, No. 8570, cash \$7,000.00, and attached check \$3,000.00, to give them the check for \$10,000.00.

Q. Mr. Sterns, I show you——

The Court: What was that for?

The Witness: Well, that was to possibly either advance for a payment on liquor that was coming in——

Mr. Burrell: In the first instance, it was to purchase a cashier's check, wasn't it, Mr. Sterns?

The Witness: That is right. And then I gave them the check and they went over to their bank at Hollywood. [361]

Mr. Burrell: That would be one of the cashier's checks which the Respondent has already introduced.

The Witness: I don't know.

Mr. Burrell: I think the record will show that.

(Testimony of Cyrus Sterns.)

The Court: That will be 21.

Mr. Burrell: No objection.

(The document above referred to was received in evidence and marked Petitioners' Exhibit No. 21.)

The Witness: On December 10th a cashier's check 8519. I have an item here for invoice, which was \$30,400.00, and I drew this check and evidently gave them the difference in cash.

Q. (By Mr. Reed): What is the amount of this check? A. \$7,800.00.

Q. The date? A. December 10, '43.

Q. Payable to?

A. I drew the cash and gave them the cash.

Q. What is the date of this check, Mr. Sterns?

A. November 16th.

Q. Amount? A. \$12,000.00.

Q. Payable to whom?

A. South Pacific, cashier's check 8271. [362]

Q. Who is the check payable to?

A. To me, and I used the cash to get a cashier's check for \$21,368.81; cashier's check for South Pacific.

Mr. Burrell: No objection.

The Court: One of those will be 22 in evidence, and the other is 23 in evidence.

(The documents above referred to were received in evidence and marked Petitioners' Exhibits Nos. 22 and 23.)

Mr. Reed: That is all.

(Testimony of Cyrus Sterns.)

Recross Examination

Q. (By Mr. Burrell): You just testified a few minutes ago, in making the entries regarding your refund, particularly your cash refund, you made a notation in a little black book.

A. In scratch paper during the day.

Q. Do you have those here in court?

A. I don't have them. I may have them somewhere around.

The Court: Do you have them in court?

The Witness: No.

Q. (By Mr. Burrell): The entries you made in the black book, which has been introduced and referred to from time to time, are not your original entries but copies from your memos you referred to? [363] A. Yes.

Mr. Burrell: That is all.

The Witness: I didn't carry the book in my pocket.

Q. (By Mr. Burrell): Your answer is yes?

A. Yes. I have the receipts to show for those.

The Court: You don't have them here in court?

The Witness: I have some of them.

The Court: If you have anything here you want to put in this record, please put it in now. Do you have receipts, Mr. Reed?

Mr. Reed: We would like—we do have some receipts, your Honor, but I believe the evidence in the record is sufficient to——

The Court: You are taking a little responsibility there. The Court is giving you an opportunity to

(Testimony of Cyrus Sterns.)

put in everything that will help you discharge your burden of proof. You have put in not very much evidence.

A few minutes ago the witness said that he had checks covering refunds. He had receipts for refunds. He had checks made to cash. And counsel, the witness stated those were in the courtroom, and counsel started to look for them.

In order that we may complete the record on those items, have you located any checks or receipts? [364]

Mr. Reed: Yes, your Honor.

The Court: For refunds?

Mr. Reed: Yes.

The Court: What is your problem there? They haven't been totaled or would it take a while to identify them?

Mr. Reed: It would take a long time to identify all of these, I am sure.

The Court: Well, you can come in tomorrow afternoon and present those, after you have analyzed them. I would rather be finished now.

Mr. Burrell: So would Respondent, your Honor.

The Court: All right.

Mr. Reed: I am satisfied our files have been torn to pieces so much that we be given the opportunity to go through them again, if the Court feels this particular evidence is desirable.

I felt the black book there, being original books of entry, made the same day in the course of busi-

(Testimony of Cyrus Sterns.)

ness, that it was of great probative value. I felt it was sufficient proof of these matters.

The Court: I think you better put them in if you have them.

Mr. Burrell: Well, Mr. Reed has handed to me here a group of checks. I don't know what they are at this moment. [365]

The Court: Can he see them?

Mr. Burrell: I am willing to let them go in for your Honor's study. You have totaled these checks and invoices, Mr. Reed? Are they more than the agents have allowed for refunds? The ones you have here, are they more than the agents have allowed?

Mr. Reed: In some instances they are, yes. I believe we have greater checks for refunds than the agent has allowed in that report.

Mr. Burrell: In the case of receipts——

Mr. Reed: In the case of receipts I believe some of these receipts are misplaced and they do not total what has been testified to by the Petitioner.

The Court: These checks entitled 1944 Refunds, totaling \$17,325.10, and received in evidence as Petitioners' next exhibit, which is Exhibit 24——

Mr. Burrell: May the record show I am not objecting to their admissibility. I would like to question the validity in the brief, because I don't know whether they can actually be proven to be refunds.

The Court: All right.

(Testimony of Cyrus Sterns.)

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 24.)

The Court: Now, what else have you? The next are some pieces of paper with an adding machine tape, supposed to [366] represent receipts for cash refunds in the amount of \$10,465.35. I suppose you have the same comment to make?

Mr. Burrell: I would like to interpose the same comment, your Honor.

The Court: It is received for whatever it is worth as Exhibit 25.

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 25.)

The Court: Here is another item of 1943 refund checks. It is offered as 26. Do you have the same comment?

Mr. Burrell: Same comment, your Honor.

The Court: Received as Exhibit 26.

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 26.)

The Court: Some small pieces of paper, supposed to represent refunds, received as Exhibit 27.

(The documents above referred to were received in evidence and marked Petitioners' Exhibit No. 27.)

The Court: I believe that is all.

Mr. Reed: That is all, your Honor.

Mr. Burrell: Respondent has nothing further, your Honor.

The Court: You may step down, Mr. Sterns.

(Witness excused.)

Mr. Burrell: Respondent will make this comment at [367] this time for the record, your Honor: Last week we mentioned that we would like to discuss with our office the desirability on our part of filing a brief in this case. At this time we will state we have no particular desire and leave it to the discretion of the Court.

The Court: Mr. Sterns, the Internal Revenue Code requires that citizens keep adequate books and records of their business transactions. No matter what the outcome of this case is, the Court believes that you are subject to severe criticism and censure for your extreme carelessness in your responsibility in failing to keep adequate books and records of your business transactions.

Whatever trouble you may have had as a result can only represent something that you have brought upon yourself. You have caused a great many busy people to have to take their time to try to solve your problems, which a responsible person would never have found it necessary to do. You have been exceedingly irresponsible.

I think you had better file briefs in this case. The original brief of the parties will be due on January 14th.

Mr. Burrell: January 14th, your Honor?

The Court: Yes. That gives you plenty of time.

And the reply briefs will be due February 20th. You don't have to file long briefs. You can file memoranda and make whatever comment you think you need to make on the record [368] which has been made.

Mr. Burrell: Thank you, your Honor.

(Whereupon, at 5:00 o'clock p.m., Tuesday, October 27, 1953, the hearing in the above-entitled matter was closed.)

[Endorsed]: Filed November 25, 1953.

[Endorsed]: No. 14740. United States Court of Appeals for the Ninth Circuit. Ruth Sterns, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Cy Sterns, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: April 25, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14740

RUTH STERNS, et al., Appellants,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

In this appeal herein, appellants will contend that The Tax Court of the United States erred in the following respects:

1. In allowing appellee to determine appellants' taxable income for the calendar years 1943 and 1944 by the bank deposit method.
2. In allowing appellee to determine appellants' income tax for the years 1943 and 1944 by a reconstruction of appellants' income from the bank deposit method without requiring appellee to support such determination by corroborating evidence.
3. In refusing to allow appellants to establish their taxable income for the years 1943 and 1944 by the use of the net worth increase method.
4. In determining as a matter of law that appellants had not met their burden of proof in establishing substantial error in the determination of the taxable income of appellants by appellee.
5. In determining as a matter of law that appellee had met his burden of proof in establishing the fraudulent intent to evade income tax for the

years 1943 and 1944 of appellant Cyrus Sterns, and in further determining that part of the deficiency in appellant Cyrus Sterns' income tax for the calendar years 1943 and 1944 was due to fraudulent intent to evade income tax.

6. In that the decision of the Tax Court of the United States is contrary to and unsupported by the facts and the evidence.

7. In that the Tax Court erred as a matter of law in not holding and determining that there is no deficiency in the income tax of appellants for the years 1943 and 1944.

8. In that the Tax Court erred by participating excessively during the trial of the case in a manner which was prejudicial to appellants.

9. In determining as a matter of fact that appellants' net income for the years 1943 and 1944 was in the amounts of \$160,492.21 and \$75,615.24, respectively, instead of the sums of \$10,204.61 in the year 1943, and a loss of \$2,881.18 in 1944, as reported by appellants in their United States Income Tax Returns for the respective years.

10. In admitting into evidence a certified copy of the judgment and conviction of Cyrus Sterns for violation of the Emergency Price Control Act of 1942, as shown on pages 82 and 83 of the transcript of the evidence; and in finding as a matter of fact upon such evidence that appellant Cyrus Sterns was convicted in the United States District Court for the Northern District of California of violating the Emergency Price Control Act of 1942; and in determining that as appellant was convicted in 1946

of violating the Emergency Price Control Act of 1942, the violation having occurred in 1944, that large sums of money were unquestionably received by appellant in connection with the operation of his business in 1943 and 1944.

Pursuant to rule 75 (a) of the Federal Rules of Civil Procedure, and rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, the appellants hereby designate for inclusion in the record on appeal to the said United States Court of Appeals for the Ninth Circuit the following portions of the records, proceedings and evidence in the action:

1. Pleadings before the Tax Court as follows:

(a) Petition.

(b) Answer.

(c) Petitioner's reply.

(d) Motion to vacate decision and for reconsideration by the full court.

(e) Brief for petitioner in support of motion to vacate decision and for reconsideration by the full court.

(f) Petitioner's brief, respondent's brief, and petitioner's reply brief.

2. The findings of fact and opinion of the Tax Court.

3. The decision of the Tax Court.

4. The petition for review.

5. The official transcript of oral testimony with exhibits thereunto attached.

6. This designation of contents of record on review, the above being the full and entire record in this matter before the Tax Court of the United States.

Dated at Los Angeles, California, this 28th day of June, 1955.

/s/ ORVILLE W. McCARROLL,
Attorney for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jun. 29, 1955. Paul P. O'Brien,
Clerk.

IN THE
United States Court of Appeals
For the Ninth Circuit

RUTH STERNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

CY STERNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petitions for Review of the Decisions of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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MAR 26 1956

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INDEX

Page

Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Regulations involved	3
Statement	4
Summary of argument	9
Argument:	
I. The evidence fully supports the Tax Court's determination of taxpayers' corrected net incomes by the bank deposit method	10
II. The evidence fully supports the Tax Court's finding that for each of the years involved a part of taxpayer, Cy Sterns', deficiencies were due to fraud with intent to evade tax	20
Conclusion	26

CITATIONS

CASES:

<i>Bodoglau v. Commissioner</i> , decided February 29, 1956	11, 21
<i>Boyett v. Commissioner</i> , 204 F. 2d 205	12
<i>Campbell v. United States</i> , 176 F. 2d 45	25
<i>Chesbro v. Commissioner</i> , 225 F. 2d 576	19, 20, 25
<i>Gendelman v. United States</i> , 191 F. 2d 993	24
<i>Gobins v. Commissioner</i> , 217 F. 2d 952, affirming 18 T.C. 1159	11
<i>Goe v. Commissioner</i> , 198 F. 2d 851	11, 20, 21
<i>Goode v. United States</i> , 149 F. 2d 377	25
<i>Greenfeld v. Commissioner</i> , 165 F. 2d 318	12
<i>Hague Estate v. Commissioner</i> , 132 F. 2d 775, certiorari denied, 318 U.S. 787	12
<i>Hall v. Gordon</i> , 128 F. 2d 461	25
<i>Halle v. Commissioner</i> , 175 F. 2d 500, certiorari denied, 338 U.S. 949	12, 20, 21, 22
<i>Hargis v. Godwin</i> , 221 F. 2d 486	22
<i>Harris v. Commissioner</i> , 174 F. 2d 70	21
<i>Helvering v. Kehoe</i> , 309 U.S. 277	21
<i>Helvering v. Mitchell</i> , 303 U.S. 391	21, 22

	Page
<i>Helvering v. Taylor</i> , 293 U.S. 507	18, 19
<i>Hoefle v. Commissioner</i> , 114 F. 2d 713	12
<i>Holland v. United States</i> , 348 U.S. 121	11, 18, 20
<i>Kilpatrick v. Commissioner</i> , 227 F. 2d 240	25
<i>Marcella v. Commissioner</i> , 222 F. 2d 878	12
<i>Mauch v. Commissioner</i> , 113 F. 2d 555	12
<i>New York & Cuba Mail S.S. Co. v. Continental Ins. Co.</i> , 117 F. 2d 404	25
<i>Reimer's Estate v. Commissioner</i> , 180 F. 2d 159	21
<i>Roberts v. Commissioner</i> , 176 F. 2d 221	11
<i>Rogers v. Commissioner</i> , 111 F. 2d 987	22
<i>Rose v. Commissioner</i> , decided January 6, 1949, affirmed <i>per curiam</i> , 188 F. 2d 355, certiorari denied, 342 U.S. 850, rehearing denied, 342 U.S. 889	11, 20, 21
<i>Scadron's Estate v. Commissioner</i> , 212 F. 2d 188, certiorari denied, 348 U.S. 832	21
<i>Spies v. United States</i> , 317 U.S. 492	21, 22
<i>Thomas v. Commissioner</i> , 223 F. 2d 83	11
<i>United States v. Boyer</i> , 105 F. 2d 595	25
<i>United States v. Gypsum Co.</i> , 333 U.S. 364, rehearing de- nied, 333 U.S. 869	17

STATUTES:

District of Columbia Code (1951 ed.), Sec. 14-305	24
Internal Revenue Code of 1939:	
Sec. 41 (26 U.S.C. 1952 ed., Sec. 41)	17, 18
Sec. 54 (26 U.S.C. 1952 ed., Sec. 54)	3, 4
Sec. 293 (26 U.S.C. 1952 ed., Sec. 293)	3, 21
Sec. 1111 (26 U.S.C. 1952 ed., Sec. 1111)	24
Sec. 1112 (26 U.S.C. 1952 ed., Sec. 1112)	20
Internal Revenue Code of 1954, Sec. 7482 (26 U.S.C. 1952 ed., Supp. II, Sec. 7482)	2, 21

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 52	17, 21
9 Mertens, Law of Federal Income Taxation, p. 286	18
Treasury Regulations 111, Sec. 29.54-1	3
Wigmore on Evidence (Third ed.):	
Vol. III, Sec. 980	25
Vol. IV, Sec. 1346a	25

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 14,740

RUTH STERNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

CY STERNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petitions for Review of the Decisions of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 31-39) are not officially reported.

JURISDICTION

These petitions for review (R. 41-48) involve federal income taxes for the taxable years 1943 and 1944. On September 21, 1951, the Commissioner of Internal

Revenue mailed to taxpayers notices of the deficiencies in the total amount of \$152,507.36. (R. 7-11, 21-26.) Within 90 days thereafter, and on December 12, 1951, the taxpayers filed petitions with the Tax Court for a redetermination of these deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3-11, 16-26.) The decisions of the Tax Court sustaining the deficiencies in the total amount of \$57,958.10 were entered on October 26, 1954. (R. 39-40.) This case is brought to this Court by petitions for review (R. 41-48) filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

Taxpayers (husband and wife) sold liquor in excess of O.P.A. ceiling prices, and failed to keep accurate records of receipts and expenditures. The Commissioner reconstructed their taxable incomes on the basis of their bank deposits and undeposited cash receipts, reduced by non-income items and allowable deductions. The questions presented are:

1. Whether the Tax Court erred in sustaining, in part, the Commissioner's determination that taxpayers understated their taxable incomes in their 1943 and 1944 tax returns.
2. Whether the Tax Court erred in sustaining the Commissioner's determination that part of the deficiencies in the taxpayer husband's taxes was due to fraud with intent to evade tax.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer*.—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U.S.C. 1952 ed., Sec. 54.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud*.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U.S.C. 1952 ed., Sec. 293.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.51-1 [As amended by T.D. 5381, 1944 Cum. Bull. 188]. *Records and Income Tax Forms*.—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commis-

sioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. Every organization exempt from tax under section 101 but required by section 54(f) to file an annual return shall keep such permanent books of account or records, including inventories, as are sufficient to show specifically the items of gross income, receipts, and disbursements, and such other information as is required by section 29.101-2. The books or records required by this section shall be kept at all times available for inspection by internal-revenue officers, and shall be retained so long as the contents thereof may become material in the administration of any internal-revenue law.

* * * *

STATEMENT

The relevant facts, which were found by the Tax Court (R. 33-37), may be summarized as follows:

Taxpayers, husband and wife, were residents of California and filed individual income tax returns for the years 1943 and 1944 with the Collector for the Sixth District of California. Their returns were filed on a cash basis. (R. 33.) Since the issues involved in this appeal relate to the business conducted by Cy Sterns, he will be referred to hereinafter as the taxpayer.

In 1943, taxpayer, through contacts with various distillers, was able to secure the delivery of quantities of liquor which was then in short supply. He also had

customers for the liquor, but he did not have a license or facilities for conducting a wholesale business. In order to facilitate his sales of liquor, he entered into an agreement on October 1, 1943, with the South Pacific Wholesale Company, hereinafter referred to as South Pacific, a wholesale liquor dealer located in Los Angeles. This agreement provided, among other things, that taxpayer was to secure the delivery of liquor from distillers to South Pacific. South Pacific was to pay the invoice price, taxes, and handling charges on each shipment, make delivery of the liquor to taxpayer's customers, and, after deducting its fee, was to account to taxpayer for all profits realized. For its services, South Pacific was to receive a fee of \$2 a case. (R. 33-34.)

During 1943 and 1944, South Pacific handled, in accordance with this agreement, 13,344 cases of liquor for taxpayer. In some instances taxpayer's customers paid South Pacific for the liquor; in other instances they paid taxpayer directly. Payments were made both by check and in cash. (R. 34.)

During 1943 and 1944 taxpayer sold liquor at prices in excess of the maximum ceiling prices established by Office of Price Administration. In October, 1946, he was convicted in the United States District Court for the Northern District of California for violating the Emergency Price Control Act of 1942, as amended. The offense for which he was convicted occurred in 1944. (R. 34.)

Taxpayer did not keep any books or records of either his business or personal receipts and expenditures. The only record allegedly kept by him consisted of a

loose leaf book which purported to show his sales of liquor at O.P.A. prices, and the amounts of his refunds to customers during 1943 and 1944. The books and records of South Pacific did not reflect the amounts paid by taxpayer's customers either to South Pacific or to taxpayer. (R. 34.)

Taxpayer's net income or loss from business for 1943 and 1944, as reported in his tax returns, and as determined by the Commissioner, are as follows (R. 35):

Year	Income Reported in Return	Income Determined by Commissioner
1943	\$10,204.61	\$160,492.21
1944	(2,881.18)	75,615.24

In 1943 and 1944 taxpayer deposited in various banks in Los Angeles business receipts totaling \$211,214.68 and \$76,088.91, respectively. A part of taxpayer's business receipts for each year were not deposited in any bank. (R. 35.)

The Commissioner reconstituted taxpayer's net income from business by including in taxpayer's gross income for each year the total of his bank deposits plus undeposited checks and cash, after making allowance for such identifiable non-income items as loans, redeposits and transfers from one bank account to another. The Commissioner allowed deductions in each year from the gross income thus determined for substantiated business expenses. (R. 35.)

The Tax Court found that the Commissioner was justified in reconstructing taxpayer's net income from

business by use of an acceptable method. However, the Tax Court found that the following items included by the Commissioner in taxpayer's gross income from business for 1943 did not constitute income to him (R. 35):

Item	Amount
Checks from South Pacific payable to H. P. Hanthorn	\$ 2,908.74
Checks from South Pacific payable to Mike O'Hara	2,000.00
Funds used by taxpayer to purchase a telegraphic money order	25,000.00
Total	<u>\$29,908.74</u>

The Tax Court also found that taxpayer was entitled to business expense deductions for 1943, in addition to the amounts allowed by the Commissioner, for refunds to customers, for cost of merchandise, and for miscellaneous expenses, as follows (R. 36):

Item	Amount allowed by Commissioner	Amount paid by taxpayer	Additional deduction
Refunds to customers	\$29,564.70	\$41,620.35	\$12,055.65
Cost of merchandise	97,637.91	129,360.34	31,722.43
Miscellaneous expense		2,681.74	2,681.74
Totals	<u>\$127,202.61</u>	<u>\$173,662.43</u>	<u>\$46,459.82</u>

Taxpayer made these refunds to customers in cash in the amount of \$10,465.35 and by check in the amount of \$31,155. (R. 36.)

The Tax Court then found that in 1943 taxpayer's net income from business was not less than \$91,749.30. (R. 36.)

The Tax Court found the following items included by Commissioner in taxpayer's gross income from business for 1944 did not constitute income to him (R. 36):

Item	Amount
Loans to taxpayer	\$10,450
Bank deposit in name of Mrs. H. P. Hanthorn	2,538
	<hr/> \$12,988.

The Tax Court found that taxpayer was entitled to business expense deductions for 1944, in addition to amounts allowed by the Commissioner, for refunds to customers, for cost of merchandise and for miscellaneous expense, as follows (R. 36):

Item	Amount allowed by Commissioner	Amount paid by taxpayer	Additional deduction
Refund to customers	\$10,140.00	\$13,638.35	\$ 3,498.35
Cost of merchandise	45,695.65	55,218.35	9,522.70
Miscellaneous expense		7,204.69	7,204.69
Totals	<hr/> \$55,835.65	<hr/> \$76,061.39	<hr/> \$20,225.74

Taxpayer made these refunds to customers in cash in the amount of \$3,900, and by check in the amount of \$9,738.35. (R. 36-37.)

The Tax Court then found that in 1944, taxpayer's net income from business was not less than \$46,301.50 (R. 37.)

Taxpayers, Ruth and Cy Sterns, paid medical expenses in 1944, in the amount of \$1,575.08. The Tax Court found that they were not entitled to any business expense deductions for taxes or charitable contributions for 1944. (R. 37.)

The Tax Court found that there were deficiencies in taxpayers' incomes for the years 1943 and 1944, in the amount of \$57,958.10. (R. 39-40.) The Tax Court also found that part of the deficiency in taxpayer Cy Sterns' income for each of the years 1943 and 1944 was due to fraud with intent to evade tax, but that no part

of the deficiencies of taxpayer Ruth Sterns for those years was due to fraud. (R. 37-39.)

SUMMARY OF ARGUMENT

1. Taxpayer's corrected net income was properly ascertained by the bank deposit method. The evidence revealed the probable source of the additional, unreported income as coming from the sale of liquor at prices in excess of O.P.A. ceiling prices. Taxpayer was given every opportunity to explain these large discrepancies, and as to those items which he could substantiate, the Tax Court adjusted the Commissioner's figures. Since taxpayer could not explain the remaining portions of the discrepancies between his reported income and his income as reconstructed by the bank deposit method, the Tax Court was not required to accept taxpayer's unsupported statements. On the evidence before it, the Tax Court properly found that the unexplained discrepancies represented unreported income for 1943 and 1944.

2. The evidence warranted the imposition of the fraud penalty as to taxpayer Cy Sterns. There were substantial discrepancies between his reported and true income for both 1943 and 1944, and he did not keep any books and records of his business transactions which showed the amount of income received by him. Furthermore the evidence, including admissions by taxpayer, testimony of other witnesses and the record of his conviction for O.P.A. violations in 1944, all disclose that taxpayer received income from black market operations which he failed to disclose. The Tax Court did not rely upon taxpayer's prior conviction as con-

clusive, but properly regarded the record of his conviction as admissible to impeach his testimony.

ARGUMENT

I

The Evidence Fully Supports the Tax Court's Determination of Taxpayers' Corrected Net Incomes by the Bank Deposit Method

During the years 1943 and 1944 taxpayers, Cy Sterns and Ruth Sterns, filed income tax returns reporting a total net income of \$7,028.32. (Exs. 1A, 2B, 3C, 4D.) The Tax Court found that taxpayers had a total net income of not less than \$138,050.80 for the same two years. (R. 36-37.) The evidence disclosed that taxpayer, Cy Sterns, was engaged in the wholesale liquor business in 1943 and 1944, in which he secured the delivery of approximately 13,344 cases of liquor from distillers to South Pacific Wholesale Company, a wholesale liquor dealer located in Los Angeles, which cases were sold to taxpayer's customers. South Pacific paid the invoice price, taxes and handling charges on each shipment, made deliveries of the liquor to taxpayer's customers, and, after deducting its fees, accounted to taxpayer for the profits realized. In some instances, taxpayer's customers paid South Pacific for the liquor; in other instances, they paid taxpayer directly. In all instances, payments were made either in cash or by check. (R. 63-67, 127-133, 135-138, 184-186, 208, 228, 301-303, 327-328; Exs. 11, 12, H.)

The evidence also discloses that taxpayer sold liquor at prices in excess of the maximum ceiling prices established by the Office of Price Administration. (R. 72-74, 111-112, 118-119, 207-209, 230-231.) Although

taxpayer received large amounts of cash and many checks from his customers in payment of liquor sold to them he did not keep any books or records of either his business or personal receipts and expenditures and did not produce any record showing the amount of his gross receipts or costs at the hearing before the Tax Court.¹ Although South Pacific maintained records of the transactions it handled for taxpayer, its records did not include the amounts paid by taxpayer's customers to him for cases of liquor. (R. 307-309.) Thus, there were not any records which accurately set forth the amounts received from the sales of the 13,344 cases of liquor sold by taxpayer. In such circumstances the Commissioner was fully justified in resorting to taxpayer's bank deposits in order to reconstruct his true net incomes for these years. *Holland v. United States*, 348 U.S. 121, 130-132; *Gobins v. Commissioner*, 217 F. 2d 952 (C.A. 9th), affirming, *per curiam*, 18 T.C. 1159; *Roberts v. Commissioner*, 176 F. 2d 221, 226 (C.A. 9th); *Rose v. Commissioner*, 188 F. 2d 355 (C.A. 9th), certiorari denied, 312 U.S. 850; *Thomas v. Commissioner*, 223 F. 2d 83, 86 (C.A. 6th); *Bodoglau v. Commissioner* (C.A. 7th), decided February 29, 1956. It has long been settled, both by this Court and by other Courts of Appeals, that under circumstances, such as are involved in this case, the Commissioner is justified in treating as income an unexplained excess of bank deposits over reported income. *Gobins v. Commissioner*, *supra*; *Goe v. Commissioner*, 198 F. 2d 851

¹ The only record maintained by taxpayer was a black book (Ex. G) which listed the amount of cases sold to individuals and the sales prices, plus the amount of refunds by cash and by check. However, this book did not contain any record of payments for cases made either to taxpayer or to South Pacific. (R. 340-342.)

(C.A. 3d); *Halle v. Commissioner*, 175 F. 2d 500 (C.A. 2d), certiorari denied, 338 U.S. 949; *Hague Estate v. Commissioner*, 132 F. 2d 775 (C.A. 2d), certiorari denied, 318 U.S. 787; *Mauch v. Commissioner*, 113 F. 2d 555 (C.A. 3d); *Hoefle v. Commissioner*, 114 F. 2d 713 (C.A. 6th); *Marcella v. Commissioner*, 222 F. 2d 878 (C.A. 8th). "Where, as here, the records kept by the taxpayer are manifestly inaccurate and incomplete, the Commissioner may look to other sources of information to establish income". *Boyett v. Commissioner*, 204 F. 2d 205, 208 (C.A. 5th). See also, *Greenfeld v. Commissioner*, 165 F. 2d 318 (C.A. 4th).

It is equally well settled, as illustrated by the above cases, that the Commissioner's deficiency determination is presumptively correct; that the taxpayer has the burden of proving it to be wrong; that the Tax Court is not obliged to accept the taxpayer's uncorroborated testimony regarding his receipts and expenditures; and that the Tax Court's finding that a taxpayer has understated his income may not be disturbed on appeal unless it is clearly erroneous.

In the present case, taxpayer listed his income for 1943 as \$17,004.37 of salaries from South Pacific and two other companies, less \$6,799.76 of business expenses, resulting in total income of \$10,204.61. (Ex. 3C.) In his amended return for 1944, taxpayer listed \$26,868.82 of commissions and \$29,750 of expenses and commissions paid, resulting in a net operating loss of \$2,881.18. (Ex. 4D.) There do not appear to be any records substantiating these amounts of salaries and commissions received, or expenses paid.

In view of the great discrepancy between taxpayer's reported incomes for these years and his bank deposits,

plus other undeposited cash and checks received by taxpayer, which was not explained by him, the Commissioner sought to reconcile these amounts and determined taxpayer's income as follows: It was stipulated that taxpayer's gross bank deposits were \$211,-214.68 in 1943, and \$76,088.19 in 1944. (R. 246.) The revenue agent who investigated taxpayer's returns analyzed taxpayer's bank deposits and withdrawals for 1943, and added to his deposits \$30,599.95 of undeposited checks received from South Pacific in the form of commissions and \$88,801.70 in undeposited currency used to purchase cashier checks. The revenue agent deducted from this gross figure the sums of \$42,921.51 representing nontaxable transfers and redeposits in the four banks in which taxpayer had accounts, \$29,-564.70 of refunds made by taxpayer to customers for deposits left with him and \$97,637.91 of payments by taxpayer to South Pacific for merchandise handled by that company for him. The revenue agent thus arrived at a net figure of \$160,492.21, which represented taxpayer's income for 1943. (R. 248-250, 294-295.)

For 1944, the revenue agent added to the stipulated deposits of \$76,088.19 the amounts of \$26,281.87 of undeposited checks received from South Pacific as commissions, \$26,777.75 of undeposited currency and \$2,-538.00 of deposits to the account of Mrs. H. P. Hanthorn. From this gross amount the revenue agent eliminated \$235.64 of bank transfers, \$10,140 of refunds to customers, \$45,695.65 of cashier checks and other checks made out to South Pacific for the purchase of liquor, leaving a net figure of \$75,615.24, which represented taxpayer's income for 1944. (R. 250-251.)

In arriving at these results, the revenue agent testified that in order to minimize the possibilities of duplication he had photostats made of South Pacific's checks which were endorsed by taxpayer, and of most of the cashier checks made out by taxpayer to South Pacific, and that he had secured copies of the deposit slips made out by taxpayer for his accounts, which listed the individual deposits of cash and checks. (R. 254, 258, 262-266, 268-270, 275; Exs. P, Q, R.) The Revenue Agent also testified that he interviewed the persons to whom taxpayer said he made refunds in cash and by check, and deducted these amounts from his determination of taxpayer's gross incomes for the years 1943 and 1944. (R. 268-271, 276-277, 281.)

Taxpayer contended in the Tax Court that the Commissioner's determination of taxpayer's income was erroneous in that taxpayer was not credited for withdrawals for accommodation sales to his customers of higher grade liquor at higher prices (R. 69-71, 141), for refunds to his customers (R. 90), for larger payments to South Pacific (R. 136-137, 321-326, 331-336) and for business expenses (R. 67-68).

Upon all of the testimony, and after receiving all the exhibits, the Tax Court modified the Commissioner's determination of taxpayer's incomes for both years by excluding various loans or inter-bank transfers, testified to by taxpayer, in the amount of \$29,908.74 for 1943, and \$12,988 for 1944. In addition, the Tax Court permitted taxpayer to take deductions for business expenses in the amount of \$2,681.74 for 1943, and \$7,204.69 for 1944, which amounts were substantiated by checks made out by taxpayer. (Exs. 11 and 12.) Al-

though part of the taxpayer's figures for his cost of goods was estimated by him and was not substantiated by either his records or by those of South Pacific (R. 321-326, 331-336), nevertheless the Tax Court permitted taxpayer additional deductions for this item for both years. (R. 36.) Thus, the only other items as to which large discrepancies existed between the revenue agent's examination and taxpayer's returns concerned the amount of accommodation sales and refunds made by taxpayer to his customers. Here the Tax Court permitted taxpayer additional deductions for all amounts which he could substantiate by checks or otherwise (Exs. G, 11, 12), in the amount of \$12,-055.65 for 1943, and \$3,498.35 for 1944.

After making all these deductions, the Tax Court found that taxpayer had a net income from his business of not less than \$91,749.30 for 1943, as contrasted with \$10,204.61 reported in his and his wife's returns for that year, and a net income of not less than \$46,-301.50 for 1944, as contrasted with a net loss of \$2,881.18 reported in his and his wife's returns. (R. 35-37.)

Accordingly, the first question presented to this Court is whether the Tax Court properly found, upon all the evidence, that there were deficiencies in taxpayer's incomes for these years. In the present case, the Tax Court gave to taxpayer every opportunity to explain these large discrepancies between his reported income and his income determined by the Commissioner, and to show that these amounts did not represent taxable income to him. The Tax Court even reopened the case for additional testimony to enable tax-

payer to substantiate his testimony that he had paid additional amounts to South Pacific for merchandise, made large amounts of accommodation sales at losses to his customers, or made additional refunds to his customers. Although neither taxpayer nor his accountant were able to verify or substantiate taxpayer's contentions, and neither South Pacific's records or his black book contained any record of such payments (R. 154, 321-326, 331-336; Ex. G), nevertheless the Tax Court permitted taxpayer to deduct several items which were estimated by him but which were not verified by any checks, withdrawals, etc. (Exs. 11, 12.)

However, even after taxpayer was permitted these additional credits, the Tax Court found that a large discrepancy existed between the amount of taxpayer's deposits and his business deductions and nontaxable items. Here the record fully supports the Tax Court's findings that this excess was derived by taxpayer from sales of liquor at over-ceiling prices, and that these excess amounts received were not entered in any records, either in taxpayer's black book or in South Pacific's books. (R. 121, 322.) Several witnesses testified that they paid to taxpayer, or his agent, black market prices for liquor (R. 207-209, 230-231), and taxpayer himself admitted to selling at black market prices and to being convicted for black market activities in 1944 (R. 72-74, 111-112, 118-119).

Under these circumstances, the Tax Court's findings and conclusions, that taxpayer grossly understated his incomes for 1943 and 1944, and that he had not less than \$91,749.30 of business income for 1943, and \$46,301.50 of business income for 1944 (R. 36, 37), is supported

by substantial evidence, and has not been shown to be "clearly erroneous". It should also be noted that taxpayer has not attacked these findings of the Tax Court on this appeal. Consequently, it is submitted that these findings and conclusions of the Tax Court should be sustained by this Court. Rule 52(a), Federal Rules of Civil Procedure; *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869.

Taxpayer's contention that because of his lack of education he need not keep complete records, that he could rely upon South Pacific's records, and that his returns reasonably reflected both his and his wife's income for 1943 and 1943 (Br. 13-18) is without merit. It is clear that where a taxpayer maintains an active and substantial business he cannot justify his failure to keep records sufficient to disclose his true income upon the ground of a lack of education. Neither could he rely upon the records of others where, as here, they do not include all the amounts received from the sale of merchandise, nor upon the fact that his returns were prepared by an accountant where he does not furnish his accountant with all the necessary information. Finally, as we have shown, both taxpayer and his wife's returns grossly understated their incomes for both years. Equally without merit is taxpayer's suggestion (Br. 32) that he could not have understated his taxable income because his assets were "entirely dissipated" by the end of 1944, since there is no showing that the assets were used to pay deductible items.

Taxpayer argues (Br. 13-32) that his "method of accounting" clearly reflected his taxable income, and that therefore under Code Section 41 the Commis-

sioner and the Tax Court were precluded from using some other method. But, as the Supreme Court pointed out in *Holland v. United States*, 348 U.S. 121, 130-132, the phrase "method of accounting" as used in Section 41 has reference to such methods as the cash receipts and accrual system of accounting; it has no applicability to a situation where, as here, the taxpayer's "method" does not accurately reflect his receipts at all and the Commissioner merely (p. 131) "calls upon taxpayers to account for their unexplained income".

Taxpayer's reliance (Br. 18-32) upon *Helvering v. Taylor*, 293 U.S. 507, and similar cases, is manifestly misplaced. It was there held that, where the Commissioner's deficiency determination was shown to be arbitrary and clearly excessive, and the Tax Court had failed to afford the taxpayer an opportunity to prove the correct amount of tax due, the Court of Appeals was empowered to remand the case in order to afford the taxpayer such an opportunity. The *Taylor* holding that a case may be remanded to permit the taxpayer to introduce further evidence in no wise detracts from the familiar rule that the taxpayer is required "to show not only that the Commissioner is wrong but also to produce evidence from which a proper determination may be made". 9 Mertens, Law of Federal Income Taxation, p. 286. Taxpayer here was afforded full opportunity to meet the burden of proving the Commissioner's determination to be wrong, and to the extent that taxpayer proved it to be wrong the Tax Court overruled the Commissioner and reduced the asserted deficiency. What is more, the Tax Court even reopened the case to permit taxpayer to

introduce additional evidence, yet taxpayer was still unable to substantiate his contentions. Taxpayer thus had every opportunity to prove his case and to remedy the deficiencies in his proof. Accordingly, there is no basis for a remand here, as there was in *Taylor*. Indeed a remand for the purpose of affording taxpayer still another opportunity would be futile, since taxpayer's failure of proof stems from his own failure to keep adequate records.

In short, the only question in this case is the purely factual one of the amount of taxpayer's taxable income. In effect taxpayer takes the untenable position that the Commissioner—rather than the taxpayer—had the burden of proving the correct amount. The rule is precisely the opposite. Even apart from established rules as to burden of proof in tax cases, the obligation to furnish evidence showing the Commissioner's determination to be wrong, and to what extent it was wrong, plainly rested on the taxpayer, since the evidence as to the amount of his receipts was peculiarly within his knowledge. Having failed to keep adequate records, taxpayer is scarcely in a position to complain of the Tax Court's determination of the correct amount of his income. *Chesbro v. Commissioner*, 225 F. 2d 675 (C.A. 2d), petition for certiorari pending. Clearly the Tax Court was not obliged to accept taxpayer's self-serving uncorroborated assertions to the effect that he accounted for all his income. Even in a criminal tax proceeding—where the taxpayer is charged with understating his income with intent to evade tax and the Government has the burden of proving the charge beyond a reasonable doubt—the trial tribunal is not

bound to accept the testimony of a taxpayer who fails to keep adequate books and records, and may accept a figure based on the Government's reconstruction of the taxpayer's income. *Holland v. United States*, 348 U.S. 121. *A fortiori* the trial court is not bound to do so where as here the Government asserts only a civil tax liability—a deficiency in tax which is presumptively correct and which the taxpayer has the burden of proving incorrect. Nor was the Tax Court obliged either to sustain or reject the Commissioner's deficiency determination in toto, as taxpayer apparently assumes. The Tax Court was of course required to reduce the deficiency to the extent that the evidence showed it to be excessive, and it did so to that extent. However, it properly refused to overrule the Commissioner's determination in its entirety, and since its findings as to the correct amount of taxpayer's income is warranted by the record those findings are entitled to finality here. *Rose v. Commissioner*, 188 F. 2d 355 (C.A. 9th), certiorari denied, 312 U.S. 850; *Goe v. Commissioner*, 198 F. 2d 851 (C.A. 3d), certiorari denied, 344 U.S. 897; *Halle v. Commissioner*, *supra*; *Chesbro v. Commissioner*, *supra*.

II

The Evidence Fully Supports the Tax Court's Finding That for Each of the Years Involved a Part of Taxpayer, Cy Sterns', Deficiencies Were Due to Fraud With Intent to Evade Tax

The question whether taxpayer filed his returns for 1943 and 1944, with intent to evade tax is a question of fact, as to which the burden of proof is upon the Commissioner. Section 1112 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 1112). However,

the nature and extent of that burden is well settled. Contrary to taxpayer's contentions (Br. 39) the penalty imposed by Section 293(b) of the Internal Revenue Code of 1939, *supra*, is a civil sanction, not a criminal penalty," and "there is no burden upon the Government to prove its case beyond a reasonable doubt * * *." *Helvering v. Mitchell*, 303 U.S. 391, 403, and cases cited in footnote 9; *Spies v. United States*, 317 U. S. 492, 495. It is also well settled that the Tax Court's finding on the issue of fraud is entitled to finality unless "clearly erroneous", with due regard given to the trial court's ability to judge the credibility of the witnesses. Rule 52(a), Federal Rules of Civil Procedure; Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. 1952 ed., Supp. II, Sec. 7482). The finding here that a part of taxpayer Cy Sterns' deficiencies was due to fraud with intent to evade tax (R. 37) has substantial support in the record and therefore should not be disturbed on appeal. *Rose v. Commissioner*, decided January 6, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,005), affirmed *per curiam*, 188 F. 2d 355 (C.A. 9th), certiorari denied, 342 U.S. 850, rehearing denied, 342 U.S. 889; *Helvering v. Kehoe*, 309 U.S. 277; *Bodoglau v. Commissioner*, *supra*; *Goe v. Commissioner*, *supra*; *Halle v. Commissioner*, *supra*, pp. 503-504; *Harris v. Commissioner*, 174 F. 2d 70 (C.A. 4th).

It has been long recognized, contrary to taxpayer's contentions (Br. 40), that proof of fraud by direct evidence is seldom possible, but generally must be found

² See *Reimer's Estate v. Commissioner*, 180 F. 2d 159 (C.A. 6th); *Scadron's Estate v. Commissioner*, 212 F. 2d 188 (C.A. 2d), certiorari denied, 348 U.S. 832.

from surrounding circumstances. For example, the Tax Court found that the returns filed by taxpayer, Cy Sterns, failed to disclose substantial amounts of income (R. 36-38), and not minor amounts as contended by taxpayer for both 1943 and 1944. Such large discrepancies between real and reported income for two consecutive years is alone strong evidence of an intent to evade the payment of taxes. *Hargis v. Godwin*, 221 F. 2d 486, 490 (C.A. 8th); *Rogers v. Commissioner*, 111 F. 2d 987, 989 (C.A. 6th), where discrepancies existed for three consecutive years.

Further proof of taxpayer's intent to evade is found in his failure to keep any books or records of business operations. Although taxpayer presented a black notebook before the Tax Court (Ex. G) which purported to contain some records, neither it nor the records of South Pacific, which taxpayer contends he relied upon to prepare his returns (Br. 49), contained any information as to the amounts which taxpayer received from his sales of liquor. Nor would taxpayer's reliance upon the assistance of others (Br. 49) negate the existence of fraud, since these other persons relied solely upon information furnished by taxpayer and he failed to give to them any records of amounts received from his black market sales. In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. *Helvering v. Mitchell*, *supra*, p. 399; *Spies v. United States*, *supra*, pp. 495-496; *Halle v. Commissioner*, *supra*, p. 502. An examination of the entire record strongly supports the belief that the reason for taxpayer's failure to keep records and make proper disclosures is that he re-

ceived large amounts of income from black market sales of liquor which he knew was illegal. This conclusion is supported, as we have shown *supra*, by admissions by taxpayer himself, by testimony of other witnesses and by his conviction for over-ceiling sales in 1944. (R. 111-112, 118-119, 207-209, 230-231; Ex. F.)

It appears that taxpayer's omission of large amounts of income was not due merely to some carelessness or negligence as taxpayers contend (Br. 45, 48-49), or due to his lack of education (Br. 43, 45, 48), but was clearly due, as the Tax Court found (R. 39), to an intent to evade. Accordingly, it is apparent that, contrary to taxpayers' contentions (Br. 39-50), there is an abundance of evidence, clear and convincing which supports the Tax Court's ultimate finding of fraud.³

Taxpayer contends (Br. 32-38) that evidence pertaining to a prior conviction for violation of the Emergency Price Control Act (Ex. F) should have been excluded, although admittedly (Br. 32) no objection was made to its admission. The Tax Court's determination of deficiencies and of fraud did not depend upon taxpayer, Cy Sterns' conviction. The cases which have permitted the Commissioner to use an alternate method to determine a taxpayer's income have not required the Commissioner to prove the exact amounts of the unreported income or the source from which such unreported income was obtained, except to show that there was a business source of income available

³ Cases cited by taxpayers (Br. 40-48) are not applicable, since the Tax Court there held, as a matter of fact, the Commissioner had not met his burden, whereas in the present case the Tax Court reached the opposite conclusion, and taxpayers have not shown the Tax Court's conclusion to be clearly erroneous.

to the taxpayer. Cf., *Gendelman v. United States*, 191 F. 2d 993 (C.A. 9th). Thus, where the use of the bank deposit method turns up large discrepancies between real and reported income, and these discrepancies can arise out of taxpayer's business, this alone would be sufficient to sustain the imposition of these deficiencies. Similarly, the existence of large deficiencies for two consecutive years, plus taxpayer's failure to keep records, would sustain the finding of fraud without the introduction of taxpayer's conviction. Furthermore, the Tax Court's reference to taxpayer's over-ceiling sales could have been in response to taxpayer's admissions and the testimony of others in this regard, and not depend upon the introduction of the conviction.

Furthermore, the Tax Court was correct in admitting the record of taxpayer Cy Sterns' prior conviction of O.P.A. violations during 1944, one of the years involved in this proceeding, and in permitting cross-examination based thereon for purposes of impeaching taxpayer's credibility. By statute (Section 1111 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 1111)), the Tax Court was bound by the rules of evidence applicable in the courts of the District of Columbia in the type of proceedings formerly within the jurisdiction of courts of equity of the District. As in many other jurisdictions, the District of Columbia provides by statute that the fact that a witness has been convicted of a crime may be given in evidence to affect his credibility as a witness, in either civil or criminal proceedings. District of Columbia Code (1951 ed.), Section 14-305. In his brief it appears

that taxpayer confuses conclusiveness and admissibility (Br. 32-38), for although a judgment in a prior cause is not necessarily conclusive in a second proceeding, it is admissible for purposes of impeaching the testimony of a witness in a second criminal or civil proceeding (*Campbell v. United States*, 176 F. 2d 45 (C.A. D.C.); *United States v. Boyer*, 105 F. 2d 595 (C.A. D.C.); *Goode v. United States*, 149 F. 2d 377 (C.A. D.C.); *Hall v. Gordon*, 128 F. 2d 461, 462, (C.A. D.C.)), and is also admissible *as evidence* where the issues in both proceedings are substantially the same and the convicted person is a party to both proceedings (cf. *New York & Cuba Mail S. S. Co. v. Continental Ins. Co.*, 117 F. 2d 404, 411-412 (C.A. 2d)). See, Wigmore on Evidence, (Third ed.), Vol. III, Section 980, Vol. IV, Section 1346a.

Since the Tax Court did not rely upon the conclusiveness of the facts in taxpayer Cy Sterns' prior conviction but merely considered the conviction to determine the veracity of taxpayer's testimony, it would appear that the opinion of *Kilpatrick v. Commissioner*, 227 F. 2d 240, 243 (C.A. 5th), admitting similar records of conviction in a tax proceeding is particularly applicable herein. As was recently said by the Second Circuit Court of Appeals in a case strikingly similar to this one (*Chesbro v. Commissioner*, 225 F. 2d 674), "That a witness [taxpayer] had engaged in practices violative of federal price controls is a factor properly to be considered in judging his credibility".

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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